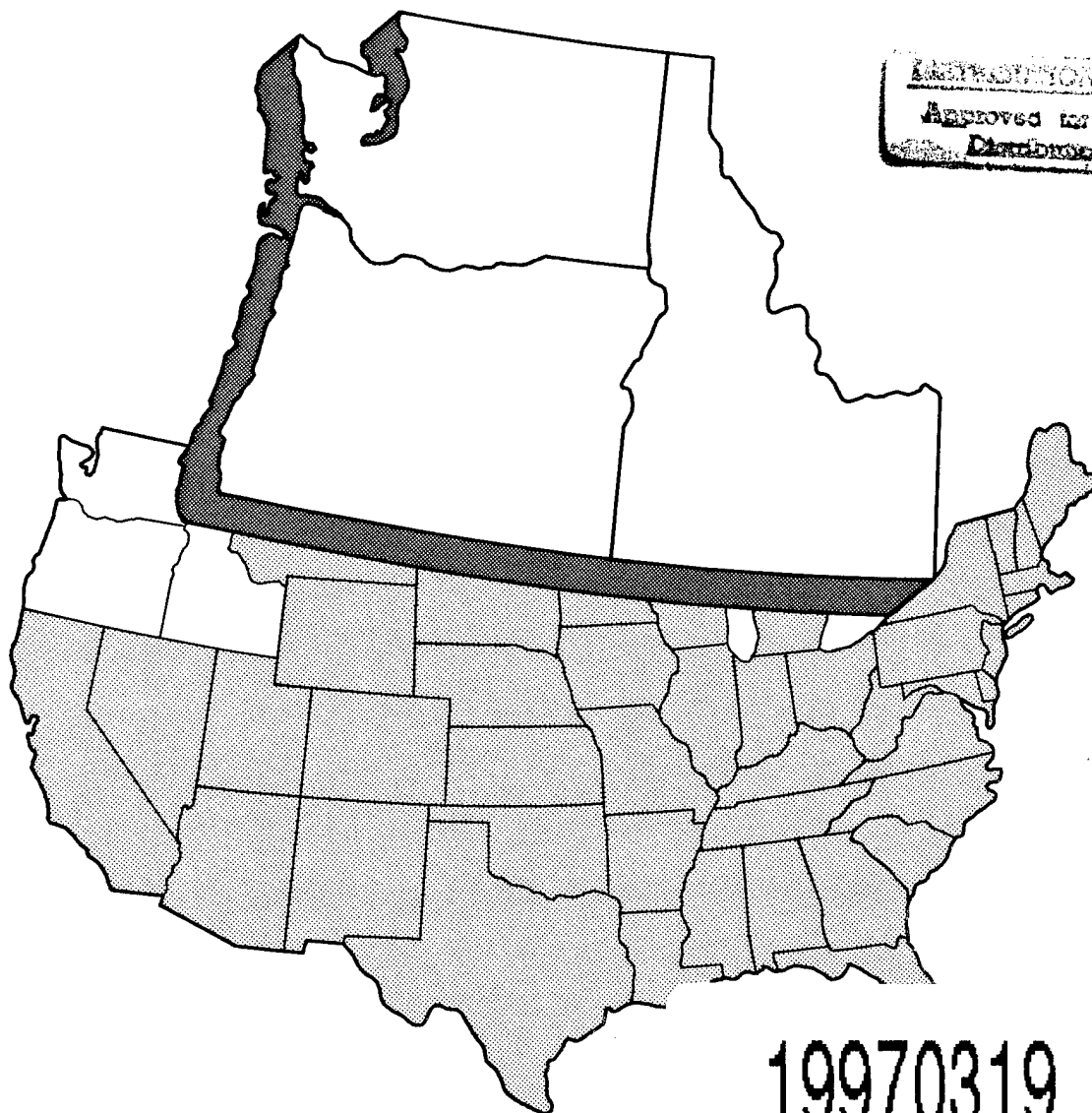


# OPPORTUNITIES TO PROTECT INSTREAM FLOWS IN IDAHO, OREGON, AND WASHINGTON



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OPPORTUNITIES TO PROTECT INSTREAM FLOWS  
IN IDAHO, OREGON, AND WASHINGTON

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## FOREWORD

Opportunities to Protect Instream Flows in Idaho, Oregon, and Washington is an update and revision of Instream Flow Strategies for Idaho (FWS/OBS-78/38), Instream Flow Strategies for Oregon (FWS/OBS-78/43), and Instream Flow Strategies for Washington (FWS/OBS-78/46). Using the initial research reported by Nelson et al. (1978a, 1978b, 1978c) as a beginning, Ms. Brandes provides the reader with a basic survey of State prerogatives and programs that can be used to protect the instream uses of water. Because of the interest and responsibilities of State fish and game agencies and other conservation organizations, most of these opportunities are related to fish and wildlife habitat. However, there are many other instream uses considered, including hydroelectric power production, recreation, navigation, downstream delivery, and waste load assimilation. The purpose of this document is to illustrate methods to protect these instream values within the context of existing rules and regulations.

Even though Ms. Brandes paid close attention to statutes, this document is not intended as a legal reference. It is designed to be a planning tool to survey current State programs, compare approaches to instream use protection, and index a preliminary evaluation of the costs and benefits of a wide range of programs. Ms. Brandes has provided a summary table for each State, which serves as an index to available opportunities. We anticipate that these tables will be the reader's most valuable guide to these reports.

The Western Energy and Land Use Team, Division of Biological Services, U.S. Fish and Wildlife Service, has published a number of similar documents in the past. Information is now available for 26 Western, Midwestern, and Southern States (Table 1). In some cases, opportunities in each State are presented in a single document, but in several publications, reports on States from the same geographical region are combined. The combination of State reports presents an opportunity for easy comparison of specific programs. This is particularly useful because of the wide variety of instream flow protection programs or possibilities.

The primary purpose of this series of documents is to point out the opportunities in instream flow management that currently exist so that planners and managers can anticipate development, plan appropriate programs, and evaluate the costs and benefits of certain courses of action. In addition, the reports are brief histories of the level of success of various State programs. The use of this information can result in a significant cost savings for planners and managers.

Each document has an Executive Summary that discusses its purpose, uses, and limitations. Each document also has separate information tables (Tables 2, 3, and 4) that summarize the contents for each State. It is hoped that the research represented in these documents provides the kind of overview and preliminary evaluation that will ease the burden of State, local, or Federal planners and managers as they seek to meet their increasingly complex responsibilities.

#### ABOUT THE AUTHORS

Kathryn K. Brandes is employed by the U.S. Fish and Wildlife Service as a policy analyst in the Instream Flow Group, Western Energy and Land Use Team (WELUT), Ft. Collins, Colorado. P. S. Wassenburg received her J.D. from Lewis and Clark Law School. She is presently a professor in the Political Science Department at Central Michigan University, Mt. Pleasant, Michigan. James D. Ruff is a staff hydrologist with the Northwest Power Planning Council, Portland, Oregon. He compiled information from the Council's Fish and Wildlife Program and Water Budget for this report.

#### SOURCES

Nelson, W., G. Horak, and S. Wilsey. 1978a. Instream flow strategies for Oregon. U.S. Fish Wildl. Serv. FWS/OBS-78/43. 113 pp.

\_\_\_\_\_. 1978b. Instream flow strategies for Washington. U.S. Fish Wildl. Serv. FWS/OBS-78/46. 107 pp.

\_\_\_\_\_. 1978c. Instream flow strategies for Idaho. U.S. Fish Wildl. Serv. FWS/OBS-78/38. 96 pp.

Table 1. Publications in the opportunity series.

Title	Publication number	Status <sup>1</sup>
Instream Flow Strategies for Arizona	FWS/OBS-78/35	Available
Instream Flow Strategies for California	FWS/OBS-78/36	Available
Instream Flow Strategies for Colorado	FWS/OBS-78/37	Out of print
Instream Flow Strategies for Idaho	FWS/OBS-78/38	Out of print
Instream Flow Strategies for Montana	FWS/OBS-78/39	Out of print
Instream Flow Strategies for Nevada	FWS/OBS-78/40	Available
Instream Flow Strategies for New Mexico	FWS/OBS-78/41	Available
Instream Flow Strategies for North Dakota	FWS/OBS-78/42	Available
Instream Flow Strategies for Oregon	FWS/OBS-78/43	Out of print
Instream Flow Strategies for South Dakota	FWS/OBS-78/44	Available
Instream Flow Strategies for Utah	FWS/OBS-78/45	Out of print
Instream Flow Strategies for Washington	FWS/OBS-78/46	Out of print
Instream Flow Strategies for Wyoming	FWS/OBS-78/47	Out of print
Opportunities to Protect Instream Flows in Alaska	FWS/OBS-82/33	Available
Opportunities to Protect Instream Flows in Nebraska and Kansas	FWS/OBS-83/02	Available
Opportunities to Protect Instream Flows in Minnesota and Iowa	FWS/OBS-83/07	Available
Opportunities to Protect Instream Flows in Georgia	FWS/OBS-83/20	Available
Opportunities to Protect Instream Flows in Michigan and Wisconsin	FWS/OBS-83/21	Available
Opportunities to Protect Instream Flows in Texas, Oklahoma, and Arkansas	FWS/OBS-83/22	Available
Opportunities to Protect Instream Flows in Idaho, Oregon, and Washington	Biol. Rep. 85(9)	Available
Opportunities to Protect Instream Flows in Maine	Biol. Rep. 85(10)	In preparation
Opportunities to Protect Instream Flows in Missouri	IFG Working Paper 308.16	
Hawaiian Water Rights and Instream Flows	IFG Working Paper 308.3	

<sup>1</sup>Available from the Western Energy and Land Use Team, U.S. Fish and Wildlife Service, Fort Collins, CO.

## EXECUTIVE SUMMARY

### OBJECTIVES

This document combines the efforts of several individuals, agencies, and organizations toward a common objective: the identification, description, and preliminary evaluation of promising opportunities for protecting instream uses of water under existing laws in Oregon, Washington, and Idaho.

This report is intended for the use of State and Federal planning and management personnel who need an overview of potential opportunities for preserving instream flows. It is not intended to replace or challenge the advice of agency counsel, nor is it written to provide legal advice. Instead, it is designed as a guide for the person trying to find his or her way among sometimes bewildering State statutes and administrative practices. This report is not, and should not be taken as, official policy or prediction of future actions by any agency. It is simply a summary of some potential opportunities for protecting instream uses.

Toward these objectives, the U.S. Fish and Wildlife Service, through its Water Resources Analysis Project, contracted in 1977 with Richard Dewsnup and Dallin Jensen to identify available strategies under State and Federal laws, interstate compacts, and water quality laws. A second firm, Enviro Control, Inc., was contracted to evaluate the most promising strategies. Three of the resulting documents were Instream Flow Strategies for Idaho, Instream Flow Strategies for Oregon, and Instream Flow Strategies for Washington, which have been revised, updated, and combined by Ms. Kathryn Brandes in this report. Some changes in the updated document include new legislation affecting instream flows in Idaho, Oregon, and Washington and deletion of opportunities based on Federal laws and powers. This report includes a new section on the public trust doctrine, written by Dr. Pinky S. Wassenburg, and a report on the Northwest Power Planning Council by James R. Ruff, Staff Hydrologist. The document has undergone extensive review by State and Federal personnel.

### BACKGROUND CONSIDERATIONS

Both State and Federal agencies have important roles to play in water management, particularly in instream flow preservation. The summaries offered here are not intended to suggest that Federal instream flow decisions will or



should replace current State water management systems. It is very important for Federal employees to recognize the importance of State water management policy and statutes. A close working relationship between State and Federal agencies is often the most practical way of getting things done. Resources are always limited and, in some cases, gathering and developing information, as required by these opportunities, may be beyond the financial power of the agency most concerned. As a result, agencies and individuals should learn to cooperate with similarly oriented private, State, and Federal organizations to ensure success. In addition, U.S. Department of the Interior employees should recognize that they are required to follow the water policies of the Secretary of the Interior.

Federal employees should be particularly cautious when using unusual or untried approaches and should refer legal questions to the office of the appropriate agency counsel. Close cooperation with the agency counsel will result in fewer lawsuits and more successful results overall.

The reader who wishes to protect or augment an instream flow should begin by looking at the physical and legal circumstances of the whole stream. A planner or manager should consider all types of land and water interests involved. The stream should be examined both up and downstream of the reach of interest. Downstream interests should be considered because often they have statutory or contractual power to hold water instream. This survey should include ownership, possession, and control of lands and waters, and their present uses, such as agriculture, planned development, wilderness, or industry.

It is important to remember that contracts or leases may be held by several organizations and individuals. In addition, government agencies may have authority over the land and water. Potential governing agencies are many and diverse, ranging from the Federal government to special districts and municipal bodies. Therefore, a knowledge of the various instream flow opportunities is important. The reader should refer to Tables 2, 3, and 4 for a guide to these opportunities.

There is often more than one way to solve an instream flow problem. When given a choice, the planner or manager should seek the least expensive, least disruptive, and simplest solution to the problem. In some cases, this may mean having a conversation with a land owner or local administrator, sending a letter to the owner or leasee of the land and water, or simply arranging a meeting between two water users who could stagger their withdrawals or, in some other way, provide for a stream flow.

Offering information on streamflow needs to other agencies of the State or Federal government is complex and often provided for by specific statutes. A risky, complex, and often expensive approach to protecting streams is the use of lawsuits. In some cases, litigation may be a necessary part of protecting a right and cannot be avoided. When possible, the manager should avoid litigation as the first resort. Lawsuits are expensive, but may be an effective way to protect instream flows when other mechanisms fail.

In using this report, the reader should be aware of its purpose and limitations. First, only a few of many possible opportunities are described herein. The user should exercise initiative, judgment, and creativity in dealing with any specific situation. Second, this report should be used only as a starting point. In any situation related to the acquisition of water rights, legal advice should be sought. This report should in no way be construed as a substitute for the opinion of a private attorney, attorney general, or agency counsel. Third, this report is neither a policy nor a decision document; it is simply a collection of opportunities which appear to have utility in a variety of situations.

A purpose of this report is to encourage cooperative and innovative thinking by all persons interested in instream flows for fish and wildlife, and watershed management at Federal, State, or local levels of government, as well as private individuals and wildlife organizations. Many talented people want to protect instream flows; their cooperation in a variety of approaches will be necessary to further this goal.

Table 2. Opportunities for protecting instream flows in Idaho.

Title	Identification		Initiation		Application		Expenditures
	General description	Applicable situations	Parties	Actions	Parties	Actions	
Appropriation of Instream Flows	Obtaining an administrative appropriation of streamflow from the State water rights agency for fish and wildlife purposes (Idaho Code 42-1503 and 42-1504)	Primarily along streams not fully appropriated; secondarily along highly appropriated streams	Public agencies, primarily the Idaho Department of Fish and Game; public interest groups	Determine quantity of flow required; petition the Idaho Water Resource Board to file for an appropriation	Idaho Water Resource Board; Director of the Idaho Department of Water Resources; Idaho State Legislature	Water Resource Board makes recommendation to Director who approves application and refers to legislature for final approval	Study cost; legislature cost
Discretionary Water Permit Authority	Utilizing discretionary opportunities by the permit authority for the benefit of instream flows (Idaho Code 42-203)	Granting new water permits or exchanges or transfers of existing rights	Public interest groups; Idaho Department of Fish and Game	Petition the Director of the Idaho Department of Water Resources to deny or amend permit application	Director of Idaho Department of Water Resources	Deny or amend permit application	Bargaining cost; study cost

Table 2. (continued)

Title	Identification		Initiation		Application	
	General description	Applicable situations	Parties	Actions	Parties	Implementation
Moratoria on New Appropriations	Obtaining a moratorium on granting of further out-of-stream appropriations from the State water rights agency for maintenance of established minimum flows (Idaho Code 42-1736A)	On streams with established minimum flows	Idaho Department of Fish and Game; Director of the Idaho Department of Resources	Determine if new diversions threaten minimum flows; petition Director of the Idaho Department of Water Resources to deny all new permit applications	Director of Idaho Department of Water Resources	Deny permit application  Administrative cost
Purchase and Lease of Water Rights	Obtaining contractual arrangements that include direct purchase of flow rights and the leasing of water rights to enhance instream flows [Idaho Code 36-104(7)]	Particularly along over-appropriated streams	Idaho Department of Fish and Game; private citizens; public interest groups	Identify stream where the purchase of only a few cfs can make a significant difference to the fishery; locate willing seller or lessor	Idaho Fish and Game Commission; private citizens; public interest groups	Purchase or lease water right  Acquisition cost; negotiation cost

Title	Identification		Application		
	General description	Applicable situations	Initiation	Implementation	
			Parties	Actions	Expenditures
Condemnation and Reallocation of Water Rights	Condemning a water right to preserve in-stream flows [Idaho Code 36-104(7)]	Along overappropriated streams	Idaho Department of Fish and Game; public interest groups	Identify streams where the condemnation of a water right can make a significant difference to the fishery; recommend condemnation of water rights to the Idaho Fish and Game Commission	Idaho Fish and Game Commission Condemn water right Water right cost; bargaining cost
Stream Channel Protection	Protection of stream channels against alteration for protection of fish and wildlife, aesthetics, and water quality (Idaho Code 42-3801)	Any stream where new water right is requested	Environmental and fish and wildlife agencies	Notify Director of the Department of Water Resources within 20 days of adverse effects on stream channel values as a result of alteration	Water Resources Department Approve or deny application based on evidence presented Study cost

Table 2. (concluded)

Title	Identification		Application		
	General description	Applicable situations	Initiation	Implementation	Expenditures
Legislative Protection of Scenic Rivers	Appropriation in the public interest of certain water sources for scenic and recreational purposes (Idaho Code 67-4301 <u>et seq.</u> )	Along free flowing stream segments, bordered by visually appealing landscapes	Department of Parks and Recreation and Governor	Determination of certain waters as scenic and recreational  Department of Parks and Recreation representing environmental interests  No further diversion allowed on designated streams	Study cost

Table 3. Opportunities for protecting instream flows in Oregon.

Title	Identification		Initiation		Application	
	General description	Applicable situations	Parties	Actions	Parties	Implementation
Reservation of Instream Flow						
Legislative Policy	Obtaining an administrative reservation of streamflow from the State water rights agency for fish and wildlife purposes or pollution abatement. (ORS 536-540)	Primarily along streams not fully appropriated; secondarily along over-appropriated streams.	Oregon Department of Fish and Wildlife; public interest groups; Department of Environmental Quality; local governments.	Determine quantity of flow required; petition the Oregon Water Policy Review Board (WPRB) to adopt a minimum streamflow legislative rule.	Oregon Water Policy Review Board.	Adopt a minimum streamflow. Administrative cost; study cost.
Minimum Stream Flow Bill (SB 225)	November 3, 1983, applications by Oregon Department of Fish and Wildlife and Department of Environmental Quality for minimum streamflows on the 75 highest priority streams to be acted on before Jan. 1, 1986, by WPRB; applications filed thereafter to be acted on within 1 year. (SB 225)	Streams needing establishment of minimum streamflow to support aquatic life or minimize pollution.	Oregon Department of Fish and Wildlife; Department of Environmental Quality after consultation with other State agencies.	Identify critical streams requiring minimum streamflows; determine quantity of flow required; file application with the WPRB.	Oregon Water Policy Review Board.	Adopt minimum streamflow recommendation; adopt more appropriate minimum streamflow or reject if more important use established. Administrative cost; study cost.

Table 3. (continued)

Title	Identification		Initiation		Application	
	General description	Applicable situations	Parties	Actions	Implementation	
					Parties	Expenditures
Withdrawal from Appropriation	Obtaining an order from the WPRB to stop any further water rights permits being issued for any or all beneficial uses from a particular stream. (ORS 536.410)	In a rapidly developing river basin.	Oregon Department of Fish and Wildlife; other State or local government agency; private individual; public interest group.	Identify river where development is rapidly occurring; petition Oregon Water Policy Review Board and Oregon Department of Water Resources to withdraw appropriations.	Oregon Water Policy Review Board; Oregon Department of Water Resources; Oregon Department of Fish and Wildlife.	Bargaining cost; administration cost; study cost.
Classification of Water	Limiting and specifying uses or quantities of use for consumption on streams, lakes, or rivers within a basin. (ORS 536.340)	In a rapidly developing river basin.	Oregon Department of Fish and Wildlife; other State or local government agency; private individual; public interest group.	Identify river where development is rapidly occurring; petition Oregon Water Policy Review Board and Oregon Department of Water Resources to withdraw appropriations.	Oregon Water Policy Review Board; Oregon Department of Water Resources; Oregon Department of Fish and Wildlife.	Bargaining cost; administration cost; study cost.
Discretionary Water Permit Authority	Use of discretionary opportunities by the permit authority for the benefit of instream flows. (ORS 536.300)	Granting new water right permits or hydro licenses.	Public interest groups; Oregon Department of Fish and Wildlife.	Petition the Director of the Oregon Department of Water Resources to deny or amend permit application or to refer to the WPRB.	Director of Oregon Department of Water Resources and/or WPRB.	Bargaining cost; study cost.



Table 3. (continued)

Title	Identification		Application		
	General description	Applicable situations	Parties	Initiation	Implementation
Scenic Waterways	Designation of stream segments under the Scenic Waterways Act to protect free-flowing character of streams for recreation and fish and wildlife uses through direct legislation or by procedure provided for in the Act. (ORS 39.805 et seq.)	Along free-flowing stream segments, bordered by visually appealing landscape.	Oregon Dept. of Transportation; citizens organizations; natural resource agencies.	Lobbying the Legislature to require ODOT to initiate study; petition.	Administer Act to protect the scenic beauty, life, and scientific and recreation features; study and propose additional stream segments for scenic waterways designation. Administrative cost; study cost.

Table 3. (continued)

Title	Identification		Application			
	General description	Applicable situations	Initiation		Implementation	
			Parties	Actions	Parties	Actions
Purchase and Lease of Water Rights	Obtaining contractual arrangements that include direct purchase of flow rights, the leasing of water rights, and the purchase of shares in a mutual water company to enhance instream flows. (ORS 496 et. seq.)	Particularly along over-appropriated streams.	Oregon Department of Fish and Wildlife; private citizens; public interest groups.	Identify stream where the purchase of only a few cfs can make a significant difference to the fishery; locate willing seller, lessor, or mutual shares company.	Oregon Department of Fish and Wildlife; private citizens; public interest group.	Purchase or lease water right or purchase shares in a mutual shares company. Acquisition cost; negotiation cost.
Riparian Zones	Property and income tax incentives for riparian land-owners to improve stream-side land through a cooperative management program. (Riparian Program, Oregon Dept. of Fish and Wildlife, 1983)	Private riparian zones in counties with county land use plan acknowledged by Land Conservation and Development Commission.	Private land owners.	Apply for property tax or income tax relief.	Oregon Department of Fish and Wildlife.	Agree to management plan with private land-owners. Income tax credit (limit established by State ceiling).

Table 3. (concluded)

Title	Identification		Application				
	General description	Applicable situations	Initiation		Implementation		
			Parties	Actions	Parties	Actions	
Multiagency Water Management Plan	Legislative directive to establish a Strategic Water Planning Group consisting of the Governor and all natural resource agencies charged with developing a data system on water accessible to all agencies. (SB 523)	All water management planning.	Governor by directive from Legislature.	Creation of Strategic Water Planning Group.	Governor and all natural resource agencies.	Assemble re-source data; evaluate future management strategies; develop geographic information system and data base; coordinate all basin studies and water management.	Study cost; administrative cost.
Condemnation and Reallocation of Water Rights	Condemnation of a water right as a property right subject to eminent domain. (ORS 540.610)	Water not put to "beneficial use;" allocation of water rights under 5-year forfeiture rule.	Private citizens; public groups; State agencies.	Identify streams not being used as designated in permit; identify streams not used in 5-year period.	Department of Transportation; Department of Water Resources.	Manage streams for reappropriation.	High administrative cost.

Table 4. Opportunities for protecting instream flows in Washington.

Title	Identification		Application		
	General description	Applicable situations	Initiation		Implementation
			Parties	Actions	
Appropriation of Instream Flow	Establishing an administrative appropriation of streamflow by the State water rights agency for fish and wildlife purposes (Ch. 90.22 RCW and Ch. 90.54 RCW).	Primarily along streams not fully appropriated; secondarily along streams that are fully appropriated.	Washington Department of Ecology (WDOE); Washington Departments of Fisheries and Game; public interest groups; Indian tribes.	Identify sites in a river basin best suited for flow management.	Washington Department of Ecology; Washington Departments of Fisheries and Game; public interest groups; Indian tribes.
Instream Flows Established as Conditions of Water Right Permits	Utilizing discretionary opportunities by the permit authority for the benefit of stream flows (1917 Water Code RCW 90.03.010 and RCW 90.03.290).	Granting new water permits or changes or transfers of existing rights, including changes of use.	WDOE; Washington Departments of Fisheries and Game; public interest groups.	Recommend to the WDOE to deny or condition water right permit.	Deny or condition water right permit. Negotiation cost; study cost.
Adjudications of Water Rights	Judicial determination of the nature and extent of existing water rights in a specific area (Ch. 90.03 RCW).	Unadjudicated areas of the State.	Washington Department of Ecology or water users.	File a quiet title action in appropriate County Superior Court.	Court review of each claim of right and decree of adjudicated rights. Administrative and hearing costs.

Table 4. (continued)

Title	Identification		Application		
	General description	Applicable situations	Initiation	Implementation	Expenditures
			Parties	Parties	Actions
Relinquishment of Water Rights	Water rights abandoned or forfeited by nonuse for any period of 5 successive years (Ch. 9014 RCW et seq.).	Any appropriate water rights that have not been used.	Governmental or private agencies and individuals owning water rights.	Washington Department of Ecology; water right owners.	May allow the appropriation of or subsequently incorporate into minimum flows for instream uses, those waters associated with a relinquished right.
					Personnel and record-keeping; judicial review of water right owner appeals.
Purchase and Lease of Water Rights	Obtaining contractual arrangements that include direct purchase of flow rights and the leasing of water rights to enhance instream flows (Ch. 77.12.200 RCW, Ch. 75.20 RCW et seq., Ch. 75.80.30 RCW).	Particularly along over-appropriated streams.	Washington Departments of Fisheries and Game; private citizens; public interest groups.	Washington Departments of Fisheries and Game; private citizens; public interest groups; WDOE.	Purchase or lease water right (may need to change use or place of use). Acquisition cost; negotiation cost.

Table 4. (concluded)

Title	Identification		Application				
	General description	Applicable situations	Initiation		Implementation		
			Parties	Actions	Parties	Actions	Expenditures
Stream Closures	Permanent closure of a stream to further consumptive appropriation by regulation (Ch. 75.20.050 RCW and Ch. 90.54 RCW).	In a rapidly developing or fully appropriated river basin.	Washington Departments of Fisheries and Game; WDOE; another State or local government agency; private individual; public interest group; Indian tribe.	Identify streams where no additional water remains for appropriation above existing rights and minimum flow. For withdrawal, identify areas where additional data are needed for water management decisions.	Washington Department of Ecology; WDG; WDF; the public.	Grant moratorium; study the river basin and make flow recommendations to be incorporated in basin plans by regulation or informally; close stream by regulation.	Negotiating cost; administrative cost; study cost.
Condemnation and Reallocation of Water Rights	Condemning a water right to preserve instream flows (Ch. 90.03.040 RCW).	Along over-appropriated streams.	Washington Department of Ecology; Washington Departments of Fisheries and Game; public interest groups.	Identify streams where the condemnation of a water right can make a significant difference to the fishery; file a condemnation proceeding in the appropriate Superior Court.	Superior Court; water right owner; WDG; WDF.	Condemn water right; change purpose of use (WDOE).	Water right compensation cost; judicial cost.

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PART I: IDAHO



## IDAHO

by  
Kathryn K. Brandes

### INTRODUCTION

The geographic diversity of Idaho contributes greatly to the varied expectations of its citizens regarding the adequate use of its water resources. Historically, gold in the north, agriculture in the south, and salmon and trout in the Clearwater, Snake, and Salmon Rivers all contributed to form the economy of Idaho. Hydroelectric power development; municipal and industrial water uses; and fish, wildlife, and recreational concerns later began to compete for water use and to significantly influence the development of the State.

The question of a clean, stable environment balanced with a strong economy is an ongoing issue in Idaho. Progress in analyzing critical instream resource values became apparent in 1978 when the Idaho legislature endorsed minimum stream flows<sup>1</sup> and minimum lake levels for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and transportation and navigation levels (Idaho Code § 42-1501). This legislation was the culmination of years of effort by the Idaho Water Resource Board, the Idaho Department of Water Resources, the Idaho Fish and Game Department, the U.S. Bureau of Reclamation, the U.S. Fish and Wildlife Service, and citizen groups to have minimum stream flows determined and recommended for the many crucial and highly appropriated stream sections of the State.

This section describes the legal opportunities to preserve instream uses in Idaho. Although there continues to be disagreement and diversity of emphasis, Idahoans are vitally interested in what is being done with their water resources (Pierce, Lovich, and Cook, 1979).

### ADMINISTRATION OF WATER RESOURCES

Water rights in Idaho are administered by the Director of the Department of Water Resources, subject to the policies of the Water Resource Board

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<sup>1</sup>For clarification, "minimum stream flow" in this paper has the same meaning as in Idaho Code § 42-1502: "...the minimum flow of water in cubic feet per second of time or minimum lake levels in feet above mean sea level required to protect the fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, navigation, transportation, or water quality of a stream in the public interest."

(Chapter 2, Title 42, Idaho Code § 42-1734). Any person, association, or government agency may request that the Board file an application for an instream flow water right on any stream in the State. The Board has adopted a policy that limits applications to public agencies. Although most of the applications come from the Department of Fish and Game, the board has accepted and, in fact, proceeded with applications from the Idaho Department of Parks and Recreation (Henry's Fork) and the U.S. Bureau of Land Management (Birch Creek). The board makes an application in the same manner as a private individual. The Director decides whether to approve the application as submitted, modify the application, or reject it (Haas 1984).

Approved applications are submitted to the Legislature and must be acted on in the same session or they stand approved (Idaho Code § 42-1503). It is important to note that the final authority in instream flow decisionmaking in Idaho lies with the Legislature.

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Pierce, J. C., N. P. Lovrich, and A. Cook. 1979. Idaho water resources management: The role of technical information in the Idaho water management process. Washington State University, Division of Governmental Studies and Services, Pullman. Draft report. 150 pp.

## APPROPRIATION OF WATER FOR INSTREAM USES

### OPPORTUNITY

The Idaho Water Resource Board can appropriate water for beneficial instream uses, subject to the approval of the Idaho Department of Water Resources and the State Legislature. The enabling legislation for appropriation of instream flows is Idaho Code §§ 42-1503 and 42-1504, adopted by the Legislature March 29, 1978. These statutes delineate the procedures by which the Water Resource Board can file for appropriation and provide the opportunity for a concerned party to file a request for appropriation with the Water Resource Board. Idaho Code § 42-1501 recognizes the importance of minimum instream flows as a beneficial use of water "...for the protection of fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation and navigation values, and water quality" (Nelson et al. 1978).

As adopted and amended by the State Legislature on March 13, 1978, State Water Plan, Policy 27, recommends that "A program should be established within the Idaho Department of Fish and Game to prepare and adopt objectives and management criteria for fish, wildlife and all other aquatic resources for all principal streams and wetlands in the state." The Water Resource Board is charged with the responsibility of formulating an integrated water plan for the conservation, development, and use of Idaho's water resources (Idaho Code § 42-1734). This law states that, subject to the primary use of water for the beneficial uses now or hereafter prescribed by law, minimum stream flow for aquatic life and the minimization of pollution shall be fostered and encouraged and consideration given to the development and protection of water recreation facilities (Idaho Code § 42-1734).

### BACKGROUND

Any person, association, municipality, county, State, or Federal agency may request, in writing, that the Idaho Water Resource Board consider making a stream flow appropriation (Idaho Code § 42-1504). In practice, the Water Resource Board has accepted applications only from public agencies, primarily the Department of Fish and Game (Cochnauer 1984). The Department of Fish and Game works with other agencies and groups (e.g., the Idaho Department of Parks and Recreation, the Department of Water Resources, private irrigation companies, water developers, the U.S. Fish and Wildlife Service, the U.S. Bureau of Reclamation, the U.S. Forest Service, and citizen groups) to share study costs and personnel to conduct instream flow studies, determine areas of concern, and agree on the filing of applications for instream flow rights.

Whenever the Board desires the appropriation of water for a minimum stream flow, it must submit an application to the Director of the Department of Water Resources. The Director forwards a copy of the application to the Departments of Fish and Game, Health and Welfare, and Parks and Recreation and to any other public entities likely to have an interest in, or knowledge of the matter. The Board holds a public meeting to determine local public interest before asking the Director to proceed. Following public notice and hearings, the Director approves the application, in whole or in part, or rejects it (Idaho Code § 42-1503). Approved applications must be submitted to the Legislature by the fifth day of the next Legislative session. Failure to act within that session constitutes approval. The priority date for approved applications is the date of application to the Director (Idaho Code § 42-1505).

Approximately 100 stream segments were evaluated for instream flow values between 1974 and the legislative enactment of Idaho Code § 42-1503 and 42-1504. Applications were submitted to the Water Resource Board for 10 of these stream segments in 1978; these applications were reviewed by the process outlined above. Three of four streams have been reviewed each year since 1978, with a backlog of over 200 streams that have been designated as having instream flow values (Reed 1984; Cochnauer 1984).

Legislative approval of instream flow appropriations is most likely for high quality streams, described as those with aesthetic, recreational, and fish and wildlife values, which would accrue the highest benefits from the protection of the aquatic habitat. Current budget constraints necessitate that recommendations be restricted to those high quality streams where Stream Resource Maintenance Flows (SRMF) are threatened by "overappropriation".<sup>2</sup>

Determination of SRMF's is dependent on detailed instream flow studies. These studies are conducted by the Department of Fish and Game because of its experience in conducting instream flow studies and its responsibility for the management of fish and wildlife resources. The Instream Flow Incremental Methodology (IFIM) is primarily used as the accepted method for this analysis (Cochnauer 1984). These studies generally involve considerable costs, depending on variables such as the length and uniformity of the stream channel.

#### EXAMPLE

An application on Silver Creek in southern Idaho was one of the first applications for instream flow rights filed with the Department of Water Resources after the 1978 legislation. This application ultimately was approved by the Legislature and is a good example of how the minimum flow concept is "tested" and the impact of local public interest (Dunn 1984; Haas 1984).

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<sup>2</sup>SRMF's are defined in the State Water Plan as a range of flows within which all aquatic life and related recreational activity are maintained and protected (Idaho Code § 42-1503).

Even though the Department of Water Resources Director approved the Silver Creek application, the Legislature almost disapproved it. Public pressure from environmental groups and fisheries agencies were influential in the legislative process. "Local public interest" is defined in a 1978 amendment to Idaho Code § 42-203 as "the affairs of the people in the area directly affected by the proposed use." One businessman applied to the Department, almost simultaneously with the Silver Creek application, to divert water from the same location for two fish hatcheries he wanted to build along the stream (Idaho's Water 1979). The businessman went to the legislative committee and persuaded the committee to modify the Department of Water Resources Director's decision to accommodate his water needs.

The Director took the position that he could not modify the committee's decision without the consent of the Board. The Board was unwilling to consent and called for another hearing while the Legislature was in session. During that hearing, the modified proposal was presented on the floor of the House. A representative from the Silver Creek area proposed an amendment that restored the full flow of the stream, as originally sought. The amendment passed unanimously. The House of Representatives approved the original decision of the Director (Pollard 1984; Reed 1984).

## EVALUATION

The Legislature's response to the challenge of the first instream flow application illustrates the importance of the Water Resource Board and the Department of Water Resources in protecting instream flows. It also is significant that, although some legislators initially were hesitant to approve the application, a consensus was reached and balance obtained between instream flow protection and water resource development (Olive 1981).

This opportunity sometimes is applied along heavily appropriated streams that face the greatest threat of being dewatered. In this case, a form is filled out that specifically states that there is sufficient water in the stream to meet the minimum flow sought. Under Idaho water law, the Director of the Department of Water Resources is not supposed to grant junior water rights that will not be satisfied in ordinary water years. The application for minimum stream flow or any other water right should be rejected if there is inadequate water in the stream in an ordinary water year. The instream flow right should be satisfied, except in years of severe drought, regardless of the location of the senior water right (Reed 1984).

There are still blocks to instream flow appropriations. According to sources in the Idaho Water Resources Department, the rate of approval of minimum flow rights applications is slow because of time and staffing constraints (Dunn 1984, Haas 1984). Because most streams in agricultural areas are fully appropriated, the Department is doubtful about the utility of a minimum flow right. However, many mountain streams and recreation areas are not fully appropriated and have strong possibilities for the appropriation of instream flow rights (Cochner 1984).

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## DISCRETIONARY WATER PERMIT AUTHORITY

### OPPORTUNITY

The opportunity to exercise discretionary authority when approving applications for water permits is available to the Director of the Idaho Department of Water Resources. The Director also has implied authority when approving the exchange and transfer of water rights between points of diversion (Idaho Code § 42-203). Changes in water use are not prohibited.

The Director can deny or include stipulations in an application for an appropriation when exercising discretionary authority, thereby ensuring that minimum stream flows will be maintained. The Director can reject or condition permits if approval of the permit as requested would jeopardize prior rights or is contrary to local public interest. Local public interest is defined by Idaho Code § 42-203 as the affairs of the people in the area directly affected by the proposed use (also see the Public Trust discussion).

The Director must give public notice of the application in the county of the proposed diversion when an application is filed with the Department of Water Resources. Objections by any interested party to the approval of an application must be filed within 10 days from the last date of publication of the notice. The Director must schedule a hearing to be held within 60 days of the receipt of the protest.

### BACKGROUND

This opportunity exists so that fish and wildlife interests, among others, can petition the Director of the Idaho Department of Water Resources to recognize instream flow needs when granting permit applications by administrative discretion. If the objecting party, such as a private individual or organization, demonstrates to the Director that granting a permit would jeopardize prior appropriations or that the filing is contrary to the local public interest, the Director can deny the application or include water use conditions in the permit.

Several applications have been protested directly by the Idaho Department of Fish and Game (Haas 1984). The Department of Fish and Game could become involved in water rights hearings through the development of cooperative agreements between the Department of Fish and Game and local organizations. The Department of Fish and Game could enlist the support of members of the Fish and Game Commission from different areas of the State and, therefore, be

in a position to raise objections to the Director of the Department of Water Resources. In either case, the primary role of the Department of Fish and Game is to provide data that documents the effects that further diversions are expected to have on aquatic and riparian habitat. This documentation relies on detailed instream flow studies that utilize accepted methodologies. These studies may incur considerable costs, depending on variables such as stream channel characteristics and length. Depending on study findings and other evidence submitted by the objecting party, the Director of the Department of Water Resources can deny the application or include conditions in the permit that limit the amount and period of use of the appropriation. For example, conditions on the amount and period of use could be included in a permit if it is determined that the appropriation would adversely affect aquatic or riparian habitat during low flow periods (Nelson et al. 1978).

### EXAMPLE

The opportunity to condition water rights is statutorily delegated to the Director of the Department of Water Resources but is not limited to the conditioning of consumptive rights to preserve instream flows. An example of conditioning an instream flow right is at issue presently in Idaho. On December 12, 1979, the Idaho Water Resource Board filed an application with the Department of Water Resources for a permit to appropriate water to preserve a minimum stream flow in the Pahsimeroi River tributary to the Salmon River. After a 4-year debate between the Idaho Department of Fish and Game, water users, and the Central Idaho Mining Association, the application was amended and approved by the Director and was to be submitted to the Legislature for consideration in its next session.

The application, however, is on appeal in District Court because of controversy over a condition placed on it (Department of Water Resources Memorandum: Decision and Order p. 10, #6): "The Director retains jurisdiction to review and amend any and all parameters of this permit and subsequent license upon his determination that the public interest is no longer served by the minimum stream flow as established. The Director will review the permit and subsequent license 10 years after issuance of the permit or upon petition of 50% or more of the registered voters residing within the Pahsimeroi River Basin."

The Idaho Department of Fish and Game contends that this condition goes beyond the Director's authority to establish conditions (Goddard 1984). Department of Fish and Game sources believe that an instream flow right that can be challenged at any time is less than satisfactory (Pollard 1984).

### EVALUATION

The example of the Pahsimeroi River illustrates the need for careful communication between agencies and the Director of the Department of Water Resources in the permit process. This opportunity can be used to preserve instream flow, or it can prove detrimental in decisionmaking regarding such flows.



Costs associated with this opportunity would result from instream flow studies documenting the impact of additional flow diversions on the aquatic habitat. The amount of funds and personnel required for those studies can vary considerably depending on the level of analysis. Some additional costs will be incurred to solicit local community leaders and organizations to file protests with the Department of Water Resources. The time expenditure on behalf of the Department of Fish and Game efforts may be well spent if the organizations assume an active role.

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## MORATORIA ON NEW APPROPRIATIONS

### OPPORTUNITY

There are no explicit provisions for either statutory or administrative moratoria on new appropriations in Idaho. Prohibitions on further appropriations on streams can be made if it is demonstrated to the Director of the Department of Water Resources that such appropriations would be contrary to the local public interest (Idaho Code § 42-203).

Local public interest is defined as the affairs of the people in the area directly affected by the proposed use. Furthermore, Idaho Code § 42-1736A, enacted March 29, 1978, establishes minimum daily flows on the Snake River at the following gaging stations: Milner (0 cfs); Murphy (3,300 cfs); and Weiser (4,750 cfs). This statute, which will become effective after adoption by the Legislature, states that only the Idaho Water Resource Board may propose average daily flows for all other streams and rivers in the State. Although there is no specific statutory authority for moratoria on new appropriations in Idaho, utilization of either local public interest or minimum daily flows does offer opportunities for instream flow preservation. Conditions on new appropriations could be in the form of moratoria to either protect the aquatic habitat in perpetuity or provide a temporary suspension on new water diversions until an "area-specific" water use plan is formulated that reflects the values and concerns of the local citizenry and the State.

### BACKGROUND

This opportunity is applied through use of either the "local public interest" or the establishment of "minimum daily flows" by the Water Resource Board, with legislative approval and enforcement by the Director of the Department of Water Resources. Fish and wildlife interests may appeal to the Director of the Department of Water Resources to deny all further water permit applications as a matter of local public interest in order to preserve instream flows sufficient for meeting fish and wildlife needs. Through cooperative agreements between the Department of Fish and Game and local organizations, the Department of Fish and Game can support private organizational efforts by providing data that document the projected effect that further diversions will have on aquatic and riparian habitats. This documentation relies on detailed instream flow studies that utilize accepted methodologies, such as the Instream Flow Incremental Methodology. These studies may incur considerable costs depending on variables such as stream channel characteristics and length. Based on study findings and other evidence submitted by the appealing party,

the Director of the Department of Water Resources may deny all new appropriation applications along the concerned stream channel segments.

The establishment of minimum daily flows in a stream compels the Director of the Department of Water Resources to suspend or make conditional all new water permits that could interfere with the minimum flow right. The Department of Fish and Game can request that the Water Resource Board apply for minimum daily flows on any stream in the State. The requested flows are to be of sufficient quantities to maintain the aquatic habitat in order to meet fish and wildlife and other aesthetic and recreational needs.

#### EXAMPLE

The Director of the Idaho Department of Water Resources has placed a moratorium on any further approval of water rights in the Snake River Basin pending court decision on the case: Idaho Power Company v. State of Idaho (Dunn 1984). At issue is the amount of the Idaho Power Company's water rights on the Snake River with a priority over upstream irrigators' rights. The water rights of both the established and more recently developed irrigation interests along the Snake River are at stake.

The case concerns a dam and a hydroelectric power plant at Swan Falls, owned by the Idaho Power Company. Some of the company's water rights for its dams and plants upstream from Swan Falls also contain subordination provisions (Haas 1984). The Swan Falls project has an early priority date for water rights up to the hydraulic capacity of the plant, which is 8,400 cfs. Water passing through the Swan Falls Power Plant flows downstream to three newer, larger hydroelectric plants, in Hell's Canyon, constructed by the Idaho Power Company. The Company's Federal Power Act license for the Hell's Canyon Project and some of its State water rights for that project contain provisions subordinating its rights to future upstream depletion of the Snake River and its tributaries. Some of the company's State water rights for its various dams and plants upstream from Swan Falls also contain subordination provisions. The Federal and State licenses for the Swan Falls plant, however, contain no subordination provision.

The Idaho Supreme Court has held that the subordination provision in the license for the Hell's Canyon projects is valid but does not, by implication, subordinate the Swan Falls Power Plant. The Supreme Court remanded to the issue of whether or not the Idaho Power Company has lost any of its Swan Falls water rights through abandonment, forfeiture, prescription, or other legal means to District Court (Grant 1983).

#### EVALUATION

Some persons fear that the Court's holding of no subordination at Swan Falls itself will restrict future agricultural development in the Snake River Plain Aquifer, which is tributary to the Snake River. Others fear that subordination at Swan Falls would result in electrical power shortfalls in southern Idaho (Grant 1983).

The District Court may find that the minimum flow set by the legislature on the lower Snake River is the extent of the Idaho Power Company's water rights. It also may determine that the Snake River Basin is fully appropriated (Dunn 1984). Either decision will have an impact on instream flows.

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## PURCHASE AND LEASE OF WATER RIGHTS

### OPPORTUNITY

Contractual arrangements that could be used to reserve instream flows include the purchase of direct flow rights and the leasing of water rights. The legal basis of this opportunity lies in the provisions of the Idaho Code § 36-104(7). This statute explicitly empowers the Idaho Fish and Game Commission to acquire waters by purchase and lease. This authority may be construed to encompass the purchase of both direct flow rights and reservoir storage. The Idaho Fish and Game Commission is the policy-making body for the Department of Fish and Game. The Commission is composed of five members appointed by the Governor.

### BACKGROUND

The Fish and Game Commission presently does not have any programs for the purchase or lease of direct flow rights or reservoir storage to protect instream flows. The Idaho Fish and Game Commission, on behalf of the Department of Fish and Game, can acquire reservoir storage by purchase of direct water flows, lease of water rights, or the purchase of shares in a mutual water company pursuant to Idaho Code § 36-104(7). The acquisition of reservoir storage might be used by the Commission on behalf of the Department to provide for reservoir releases to maintain instream flows below a dam. The lease of water rights and shares of storage provides only an interim solution, but could be applied to protect a valuable fishery in a particular stream where no permanent supply of flowing water is available for purchase.

The major cost of implementing this strategy is the price of water rights, which has risen dramatically in the last few years and will probably continue to rise. However, a water right might be sold to be used at a point downstream where few instream flow values worth preserving exist, thereby defraying part of the acquisition cost. Other costs include personnel and funds for studies to identify streams where a purchase would have the greatest benefit, and the substantial effort required to negotiate for such a purchase.

## EXAMPLE

Although this opportunity has not been used for instream flows, it should be considered as an option in certain situations (Haas 1984). For instance, rights could be approved through the State Water Plan for agricultural use and, through a transfer of use, be sold to the Department of Fish and Game at a later date, if the initial use was no longer needed (Reed 1984).

## EVALUATION

Contractual arrangements for the enhancement of instream values have not been used in Idaho, because of past statutory prohibitions against in situ appropriation of instream flows through the purchase and lease of water rights. Since legislative adoption, Chapter 15, Title 42, Idaho Code, allows any party to file a request with the Idaho Water Resource Board for appropriation of instream flows with legislative approval. This statute could be used in conjunction with the purchase and lease opportunity. Although the purchase or lease of reservoir storage can be used for flow releases, such releases may be subject to appropriation by downstream users. The effectiveness of this strategy can be enhanced by the appropriation of instream flow rights secured through reservoir releases for conservation purposes.

In the past, the Department of Fish and Game and the Commission have been reluctant to spend funds for the purchase and lease of reservoir storage for flow releases. This reluctance is due to the susceptibility of the flow to appropriation downstream for other purposes.

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## CONDEMNATION AND REALLOCATION OF WATER RIGHTS

### OPPORTUNITY

This opportunity is available to the Idaho Fish and Game Commission. The Commission is empowered to acquire, by purchase, condemnation, lease, or agreement, land and waters for the restoration, propagation, and protection of fish and wildlife [Idaho Code § 36-104.(7)]. The Commission is the policy-making body for the Idaho Department of Fish and Game and consists of five commission members, who are appointed by the Governor.

### BACKGROUND

The Idaho Fish and Game Commission can condemn water rights in order to reserve or re-establish minimum instream flows where a valuable fishery is threatened by flow diversions. For example, the Commission can use this opportunity when a valuable fishery has become degraded as a result of over-appropriation. The Idaho Department of Fish and Game can recommend to the Commission that the water rights of a stream be condemned. The decision to condemn a water right, however, must be approached with care. The potential benefits of such an action must be weighed against the costs, including pecuniary cost to the water rights owner and the political costs to the Commission.

The most valuable fisheries with unique stream attributes generally should be considered for the application of this opportunity. Even in such instances condemnation would not occur until all other possibilities were considered and a thorough evaluation made of associated effects and costs.

### EXAMPLE

No example was found where the Fish and Game Commission has condemned a water right to preserve fish and wildlife resources.

### EVALUATION

The Fish and Game Commission has not used condemnation to preserve instream flows (Haas 1984). The Department of Fish and Game, on behalf of the Commission, indicates that condemnation currently is removed from consideration because of the potential political backlash. Condemnation would be used only through a legislative mandate (Reed 1984).

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## STREAM CHANNEL PROTECTION

### OPPORTUNITY

The Legislature of the State of Idaho has declared that the public health, safety, and welfare requires that the stream channels of the State and their environments be protected against alteration that would adversely affect fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, and water quality (Idaho Code § 42-3801).

### BACKGROUND

The Department of Water Resources Director must consider any application for a permit to alter a stream channel and consult with other State agencies that have an interest in the channel. The likely effect of the proposed alteration on fish and wildlife habitat, aquatic life, and other instream values must be determined. The other State agencies have 20 days to notify the Director of the Department of Water Resources of any expected detrimental effects on stream values as a result of the alteration. Recommendations for alternate plans determined to be reasonable in preserving stream values must be included.

### EXAMPLE

The Stream Channel Protection Act has never been used.

### EVALUATION

The Stream Channel Protection Act was developed in 1970-71 specifically in an effort to protect the environment. It was initially controversial but has become less so with time, although it has never been used (Haas 1984).

The Legislature has taken funds away from the Department of Water Resources, which resulted in the elimination of the jobs of the persons charged with administering the Act. Currently, there is one person for North Idaho and one for South Idaho; both of these persons also have other duties. There is little enforcement of the Act except on a voluntary basis (Reed 1984).

## SOURCES

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Reed, S. Personal communication. Private attorney. Coeur d'Alene, ID. Phone conversation and letter. Sept. 1984.

## LEGISLATIVE PROTECTION OF SCENIC RIVERS

### OPPORTUNITY

The Idaho Legislature has authorized and directed the Governor and the Parks and Recreation Board to appropriate the unappropriated water of certain specified water sources for the benefit of the public. The water sources involved are declared by the Legislature to possess scenic beauty and offer recreational opportunities. The waters involved are Big Payette Lake, Priest Lake, Pend d'Oreille Lake, Coeur d'Alene Lake, Malad Canyon Springs, Niagra Springs, Big Springs, Box Canyon Springs, and Thousand Springs (Idaho Code § 67-4301 et seq.).

### BACKGROUND

Under the provision of Chapter 43, Title 67, Idaho Code, the Governor and the Idaho Parks and Recreation Board are authorized and directed to appropriate all the unappropriated waters of certain lakes in trust for the people of the State. The preservation of these lakes for scenic beauty, health, recreation, transportation, and commercial purposes is declared to be a beneficial use, and no diversion of the water from the lake is required to perfect the appropriation (State of Idaho 1974).

### EXAMPLE

The constitutionality of this Act was tested in the Idaho Supreme Court in 1974 in State Department of Parks v. Idaho Department of Water Administration. The Department of Parks was denied a permit for the appropriation of the unappropriated waters of Malad Canyon Spring (one of the springs included in the Act). The appropriation was protested by the Idaho Water Users Association and the Idaho Department of Water Administration.

The Idaho Supreme Court decided in favor of the Department of Parks, ruling that the Constitution of Idaho does not limit the right of appropriation to private parties; thus, government agencies can hold water rights. The Court ruled that beneficial uses of water were not limited to those uses specified in the Constitution and that using water for aesthetic and recreational purposes was recognized in Idaho and other States. The Court also declared that the Legislative definition of beneficial use was proper. The final decision of the Court regarding diversion requirements was that the Legislature had intended to dispense with any physical diversion requirements for Malad Canyon (Olive 1981).

## EVALUATION

The Malad Canyon decision answered some of the legal questions surrounding instream flows and settled the physical diversion issue connected with the five sites named in the Scenic Rivers Act, Chapter 43, Title 67, Idaho Code. Idaho still does not have State Wild and Scenic legislation. However, an initiative effort by a private group is expected in the 1986 general election. Efforts by the Department of Parks and Recreation to preserve flows for recreational purposes on the Payette River and Henry's Fork on the Snake River have been frustrated by the relatively slow process of gaining legislative approval. The Department of Parks and Recreation believes that negotiating with developers prior to development in order to ensure an acceptable minimum flow is essential and the most effective and appropriate method. Obtaining an instream flow right is the only way recreation can be preserved around hydro-power development sites (Meinen 1984).

## SOURCES

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PART II: OREGON

## OREGON

by  
Kathryn K. Brandes

### INTRODUCTION

Oregon has long been in the forefront of those States that recognize the importance of preserving instream uses. Its water resources are rich and essential with over 200 miles of coastal land and an extensive river system, which includes 22% of the massive Columbia River Basin. Oregon's awareness of the growing competition for its water resources is noteworthy.

Originally a Riparian Doctrine State, Oregon has practiced appropriation (posting of notice) since the late 19th century. The first statutes to regulate the notice process were adopted in 1903 and 1905. Oregon adopted a comprehensive Water Code that regulated the appropriation of surface water in 1909. Under Oregon law, a water right is a right to put water to a beneficial use. Oregon statutes identify the following uses of water as beneficial: domestic; livestock watering; municipal; irrigation; power development; industrial; mining; recreation; wildlife; fish life; pollution abatement; ground water recharge; scenic or aesthetic attractions; fire protection; navigation; and railway purposes (ORS 536.300, 537.135, 537.170, and 537.310). Although instream uses are statutorily recognized as beneficial, State agencies administering this system have always interpreted the statute as requiring a diversion of water from the stream in order to have a water right. The priority of a water right is the date the permit application to appropriate water was initially filed with the State. The right is perfected by using water for beneficial use within a specified time. The perfected right is evidenced by a water right certificate issued by the State.

As early as 1929, Oregon began legislatively withdrawing streams from appropriation as recognition of the importance of instream uses emerged. However, it was not until the 1970's that instream use withdrawals were based on the ecological and philosophical arguments, advanced by environmentalists, that large ecosystems be preserved in some state of equilibrium. The challenge of balancing these public rights with traditional consumptive uses is an ongoing, cooperative process in Oregon.

### ADMINISTRATIVE CONTROLS BY THE OREGON WATER RESOURCES DEPARTMENT

Oregon's water resources are administered by the Water Resources Department (WRD), which consists of the Water Policy Review Board (WPRB), the Water Resources Director, and their employees and assistants (ORS 536.008).

The Governor appoints five members of the WPRB to represent each of the State's five Congressional districts; the other two members are appointed to represent the State at large. The Water Resources Director, also appointed by the Governor, is the Chief Administrator of the Department and is responsible to the WPRB.

A major statutory duty of the WPRB is to formulate an integrated, coordinated program for the use and control of all the water resources of Oregon (ORS 536.300). Other statutes mandate the WPRB to classify the State's waters for their highest and best use (ORS 536.340) and to develop plans and programs for water resource development (ORS 536.430). The WPRB also exercises approval authority for certain regulatory decisions of the WRD, although it does not act on routine appropriation permits issued by the Director within the framework of the WPRB's established basin programs (see pp. 26-28, below).

WPRB policy statements and basin plans are binding on other State agencies through provisions for coordination included in statute. In formulating its plans and programs, the Board must provide other agencies an opportunity to be heard (ORS 536.300) and furnish statements of its policies and programs to those agencies (ORS 536.350). The agencies are required to notify the Board of proposed actions that might conflict with WPRB policies and plans (ORS 536.380) and to comply with recommendations of the Board concerning those actions (ORS 536.360). The Board is authorized to take Court action to enforce compliance. Despite these broad mandatory coordination powers, ORS 536.320 specifically prohibits the Board from interfering with the internal affairs of other State agencies.

#### CONTROLS BY OTHER STATE AGENCIES

Although the WRD is the lead agency in determining State water policy, a number of additional State agencies have responsibilities to make water policy recommendations in determining opportunities for the protection of instream flows. The Department of Environmental Quality (DEQ) has a substantial impact on water matters through the administration of the water quality control program. The Oregon Department of Fish and Wildlife is involved in water resource planning and management through fisheries programs mandated by statute (see pp. 26-28, below).

Programs that affect the management of water resources are administered by several other State agencies. The Department of Environmental Quality is responsible for maintaining and protecting water quality to support established beneficial uses. Logging and forest management activities affecting water quality are regulated by the Department of Forestry under the Forest Practices Act. Sand and gravel extraction and other removal and fill operations are regulated by the Division of State Lands. Drinking water supplies are regulated by the Department of Human Resources Health Division and by the U.S. Environmental Protection Agency. The Water Policy Review Board adopts basin programs that establish and protect the permissible beneficial uses of water, including consumptive and instream uses. The Water Resources Department and the WPRB both have responsibility in the issuance of permits for the diversion of water for out-of-stream uses and licenses for the hydroelectric development of the State's waters. The Department of Land Conservation and Development

reviews and acknowledges city and county comprehensive land use plans that provide for future developments with potential impacts on both the quality and quantity of water. The Parks and Recreation Division of the Oregon Department of Transportation is responsible for the administration of the State Scenic Waterways Act. Senate Bill 523 (discussed on pages 53-54) was enacted by the 1983 Oregon Legislature in an attempt to introduce effective coordination of water-related activities of the agencies into the process of managing the State's water resources.



## RESERVATION OF INSTREAM FLOW

### LEGISLATIVE POLICY

#### Opportunity

Oregon has been a leader in creating legal means to reserve instream flows since 1955, when the so-called "minimum streamflow"<sup>3</sup> law (ORS 536. 300-310) was passed. This law classified fish and wildlife uses and pollution abatement as beneficial uses of water and authorized a citizen board, the Water Resources Board (since replaced by the Water Policy Review Board). This citizen board is authorized to adopt minimum stream flows (MSF) as part of its basin programs. These administratively-adopted minimum flows are not, technically speaking, water rights, although they function similarly. The priority date of MSF adopted under the 1955 law is its date of adoption. Water rights with priority dates junior to the MSF (other than those for human and livestock consumption) are required to be turned off when the water flow in the stream drops below the adopted MSF (Sherton 1984). Because the minimum stream flow is created by administrative rule, it can be revised, suspended, or even withdrawn altogether by another administrative rule.

#### Background

The parties formally involved in formulating and applying this opportunity are the Water Policy Review Board (WPRB) and the Department of Water Resources. Under the minimum stream flow law the WPRB adopts the MSF's. It is the statutory responsibility of the Director of the Department of Water Resources to administer the water rights system and enforce the WPRB programs.

The procedural requirements of ORS 536.325, passed in 1979, for adoption or change in MSF's, have been interpreted by the WPRB (until passage of SB 225, see pp. 30-32) as allowing adoption of an MSF only as part of a comprehensive revision of a Basin Program (Sherton 1984). The WPRB has established water resources policy for most of the State's water basins. The Board reviews and updates these basin policies one or two at a time in a process of public hearings, staff review and input from other agencies and local advisory committees (Faast and Fredd 1984). This process takes 2-4 years to complete

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<sup>3</sup>"Minimum streamflow" is defined in Oregon as "the streamflows established to support aquatic life and minimize pollution and to identify flow objectives for the support of aquatic life and minimization of pollution" (ORS 536.310).

for each basin. The Board considers the recommendations and decides whether or not to designate a minimum stream flow in the basin. If a minimum flow is designated, it is junior to all water rights for which applications were filed before the priority date of the minimum stream flow, but senior to rights for which applications were filed after that priority date (see p 30-32). The Department of Water Resources, by means of local watermasters, enforces the minimum flows, along with water rights granted by permit.

The administrative procedure outlined above was the only way to reserve natural instream flow under Oregon law prior to the passage of SB 225. That is the present interpretation of the law as it is administered by the State Department of Water Resources, in both its policy-development and its permit-granting functions (Nelson et al. 1978). No permits are issued for direct passage of natural flows to remain in the waterway. Water permits have been issued to the State Fish and Wildlife Department and to other applicants for water to be kept in the stream when either the release of stored water or another kind of diversion were involved.

The major costs of this strategy are the funding and staffing of the studies necessary to make clear and specific recommendations to establish minimum flow needs. About 400 minimum stream flows have been set under the statute, and about 50 reservoir storage release permits have been issued for instream flow purposes. Adoption of minimum stream flow is sometimes used in combination with the purchase of stored water in reservoirs for release at low flow periods. In some cases, this is the only way to ensure enough water to maintain the needed flow during the dry season.

In its Statewide program of individual basin studies, the Water Policy Review Board takes action to ensure that the remaining unappropriated water will be put to beneficial use. A river basin program statement generally has two major features:

1. It classifies the waters in the basin in terms of which beneficial users may be the subject of further water rights from each stream; and
2. It establishes minimum stream flows for some streams. From the time that a minimum stream flow is established, new water uses that would result in the stream flow dropping below the minimum are subject to cutoff as a junior right (Bureau of Governmental Research and Service 1977).

Basin program statements have been adopted for all of the 18 major drainage basins in the State except the Klamath Basin, Goose and Summer Lake Basin, and the Malheur Lake Basin. The WPRB attempts to review these basin programs periodically, and MSF's can be revised upwards, as were those for the Umpqua Basin in 1974 (see p. 28), or repealed.

## EXAMPLE

The Oregon Water Resources Board, predecessor to the Water Policy Review Board, established minimum stream flows at seven different points on six streams in the watershed of the Umpqua River Basin in 1958. Few field studies had been undertaken in the basin at that time; although recommendations were submitted by the Oregon State Game Commission<sup>4</sup>, there were little data on which to base them. The recommended minimum flows were the averages of the three lowest flows of record at each point. The Commission believed that the minimum flows established in 1958 were grossly inadequate; however, the basin policy was not reviewed for 14 years. New methods for analyzing data were developed from the review, and the recommendations were refined.

The Umpqua River Basin consists of four subbasins, which support both anadromous species and other game and nongame fish. The most important limiting factor in fish production is the low water supply from July through October. In the south Umpqua and lower main Umpqua, naturally low flows are further depleted by extensive water withdrawals. Water quality problems caused by domestic and industrial pollution, siltation, inadequate amounts of dissolved oxygen, and high summer water temperatures (over 70° F) exacerbate the situation.

The Oregon State Game Commission completed its stream flow study of the Umpqua Basin in 1968. They studied spawning and rearing requirements of salmon and steelhead, as well as the water requirements of local game. The 1968 minimum stream flow recommendations were detailed and covered approximately 130 locations along the rivers. The recommendations ranged from 1 cfs at the mouth of tiny Johnson Creek in August and September to 1,000 cfs at USGS gage #14-3229 in the main stem of the Umpqua in the winter.

The Water Resources Board adopted a new set of minimum stream flows for the basin in 1974, involving some 60 control points on 48 different streams and establishing minimum flows close to those recommended. These flows were enforced until the drought of 1977, when the Board suspended the minimum flow requirements for the South Umpqua River when enforcement would have cut off junior rights holders, including municipalities. Even though the stream got as low as 60 cfs, the Oregon Department of Fish and Wildlife did not object to the suspension because low flows in the 1973 season had already seriously damaged the fishery (Nelson et al. 1978).

Almost all of the minimum stream flows in the current basin programs were adopted to protect fish life, but even so, they do not respond to all fishery needs. Nevertheless, WPRB establishment of minimum stream flows is a significant and unique practice. Needed minimum flows were determined in 1973 (Kline 1984). The enforcement system and stream flow policy of the Water Resources Department face a real test when unusually dry periods result in severe hardships for persons who have water available in normal years, but have no legal right to take water reserved for minimum flow purposes. The

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<sup>4</sup>The Oregon Game Commission and the Oregon Fish Commission have merged and are now the Oregon Department of Fish and Wildlife.

Board has suspended minimum stream flows on rare occasions (as on the South Umpqua) because of critical water conditions for other uses (Bureau of Governmental Research and Service 1977).

### Evaluation

Getting a minimum flow requirement adopted often has been a long and relatively costly process in Oregon. For example, revising the initial minimum flow in the Umpqua Basin took 16 years. The result usually is worth the time and effort if sufficient unappropriated water is still available. According to the Department of Water Resources, minimum flows have been successful in protecting fish and wildlife on such rivers as the North Umpqua, Rogue, Deschutes (only on minor tributaries), and in the Willamette Basin (Nelson et al. 1978).

One constraint on this opportunity to protect instream flows is over-appropriation. If a stream is already overappropriated, a minimum flow, which has the status of a junior water right, is of limited use in the critical low flow summer season if upstream senior users need the water. However, downstream senior rights can be significant. Rights holders junior to the downstream use, but senior to the MSF have the duty to leave water in the stream that will reach the senior downstream user. A corollary of the over-appropriation problem is the difficulty in enforcing an instream minimum flow over junior water rights holders when there is a water shortage. Some of the enforcement problems are administrative. As a Department of Water Resources source points out, the minimum stream flow is like a public right (Nelson et al. 1978). The "public" generally does not, like individual water rights holders, file complaints that junior users are not being curtailed. However, the Oregon Fish and Wildlife Department and other agencies should represent the public interest. Watermasters are assigned to each basin to control distribution of available water; however, staffing to ensure the greatest Statewide efficiency is limited (Bureau of Governmental Research and Service 1977).

Another constraint indicated by Department of Fish and Wildlife sources is the reversability of a minimum flow established by administrative rule (Nelson et al. 1978). Where political pressure can be brought to bear, and where the Board has the power to reverse or suspend a rule, the established minimum flow may not survive a season of water shortage, as was recently true of the lower Umpqua Basin. This lack of protection seems to be a weakness in the Oregon system.

Even when minimum flows are not suspended by the Board, local political and judicial attitudes may make it difficult to enforce the flows when the choice is between adverse effects on fish and wildlife or water quality and adverse effects on the economic interests of holders of junior water rights. For example, a conflict on the John Day River between farming interests, who held water rights junior to the established minimum stream flows, was resolved by a local Court in favor of the holders of the junior rights. The position of the Water Resources Department and the State Attorney General's Office was that the Circuit Court had no jurisdiction to contradict an administrative rule arrived at by normal statutory procedures. The establishment of a minimum flow serves as part of the total management program (Kline 1984).

In a more recent challenge of the minimum flow established for the John Day River, the local Court held that it had no authority to enjoin the Water Resources Department's enforcement. The Court referred the petitioners to the State Court of Appeals for proper jurisdiction. The Court of Appeals has not yet reviewed the "legality" of the WPRB minimum flow requirements (Faast and Fredd 1984).

Sources in the Departments of Fish and Wildlife and Water Resources agree that the John Day River situation has political, as well as administrative and legal aspects. The problem of enforcing minimum flows arises in part from a public misunderstanding about the nature of junior water rights. Persons who take out permits tend to assume that enough water will be available to serve their needs; when they see water in the river, they have a difficult time understanding why they cannot use it. The public sometimes also lacks an understanding of fisheries needs. On the John Day River, for example, the presence of large numbers of smallmouth bass despite the low flow obscured, for some local observers, the very real damage being done to the salmonid fishery (Nelson et al. 1978).

As permits continue to be issued and water continues to be appropriated, the economic inequities of the hardships on junior water rights holders are more and more likely to be argued both in the courts and before the Board. Nevertheless, the Oregon minimum stream flow law and the administrative process through which it is enforced have been successfully employed in the past and are likely to be applied in the future.

#### MINIMUM STREAM FLOWS (SENATE BILL 225)

##### Opportunity

The Minimum Stream Flows Senate Bill (SB 225) was passed by the 1983 Oregon Legislature. This Bill does not take away the authority of the WPRB to initiate the process to establish minimum stream flows. The bill does authorize the Oregon Department of Fish and Wildlife (ODFW) and the Department of Environmental Quality (DEQ), after consultation with other State agencies, to request prompt action by the Water Policy Review Board (WPRB) on establishment of Minimum Stream Flows (MSF) for a specified number of high priority streams.

##### Background

Senate Bill 225 has long and short-term implications for policymaking, priority-setting, and initiating the process of setting MSF's and needed legislation. It requires the WPRB to act on applications filed by the ODFW and DEQ for the establishment of MSF's for 75 "highest priority" locations on streams by January 1, 1986. The WPRB must review all 75 applications and either adopt the recommended MSF, adopt a MSF at some other flow rate determined to be more appropriate for supporting aquatic life and minimizing pollution, or reject the MSF after finding that establishment of a MSF is less important than the other uses of the water of a particular stream. Additional applications may be submitted by the ODFW and the DEQ after the applications

for the first 75 stream locations have been acted on. The WPRB is required to act on these additional applications within one year of their application.

Another significant feature of this Bill is that it establishes the priority date of an adopted MSF as the date the ODFW or the DEQ filed the application with the Department of Water Resources Director, rather than the date it is adopted by the WPRB. This provision is already in effect for out-of-stream water rights, where priority dates have always related back to the date the initial permit application was filed.

Senate Bill 225 also created a Joint Legislative Committee on Water Policy with broad responsibilities, including reviewing the progress of the DWR in carrying out the intent of the Bill. This committee also is charged with making recommendations to the legislature on matters that relate to Oregon water resources.

### Example

The 75 "highest priority" stream locations were designated and applications filed with the WPRB as of November 3, 1983. The WPRB adopted administrative rules to implement SB 225. In February and March, 1984, the WPRB held public meetings in the 13 basins for which there were applications for MSF's. No final action has been taken by the WPRB on any of these applications at this time, with the exception of one basin. This exception is the Rogue Basin with applications for nine MSF's. The WPRB was nearing completion of a comprehensive update of the Rogue Basin Program at the time the applications were filed, a process with which it had been involved for over 2 years. Therefore, the MSF applications for this basin were considered as part of an overall basin plan update (Sherton 1984). The revised basin program was adopted June 19, 1984. Applications for six MSF's were adopted as submitted. One application (Bear Creek) was rejected because the establishment of minimum perennial streamflows on Bear Creek was determined to be of lesser importance than other uses of the stream (a statutory criterion) (Sherton 1984).

The MSF applied for in Thompson and Reese creeks was adopted as submitted for the period September 15 through June 15; the requested flow was not adopted for the period of June 15 through September 15 (i.e., the MSF for this period is 0). The WPRB apparently considered this action a rejection of the MSF application for the June 15 through September 15 period, rather than as an adoption of the MSF application with modified flow rates. This action was based on the determination that the establishment of an MSF is of lesser importance than other uses of the stream for the period of June 15 through September 15, rather than on the belief that the amount adopted for the June 15 through September 15 (0 cfs) period was appropriate for supporting aquatic life and minimizing pollution (Sherton 1984). This was, in effect, a partial rejection of the MSF applications. It is unclear whether or not SB 225 actually authorizes the WPRB to make partial rejections (Sherton 1984).

### Evaluation

The Minimum Stream Flows Bill appears to be a positive step toward ensuring maximum beneficial water use, while preserving the instream value of water

resources. Oregon has a statutory commitment to a coordinated State water resources policy (ORS 536.220). Including the ODFW and the DEQ in the filing process for adoption of a minimum stream flow provides for greater agency coordination in Oregon.

Although sources from all three involved agencies (WRD, ODFW, and DEQ) believe that SB 225 is a positive change in Oregon Water Law, their evaluations of its potential effectiveness vary.

The fact that setting minimum stream flow has been placed in "high priority" alters the historical view of the WRD that its primary mission is the processing of permits for out-of-stream consumptive users (Sherton 1984). The WPRB has some concern that this rearrangement of priorities may result in delays in carrying out comprehensive Basin Program updates. This procedure for the systematic evaluation of each River Basin, can include setting MSF's. The decisionmaking time constraints (2 years for applications on the initial 75 stream locations and 1 year for additional applications) on the WPRB also affect their priorities. However, a shorter time period between needs identification and action may better serve the public interest (Sherton 1984).

Different groups vary in their orientation toward the opportunity for establishing MSF's. The more traditional consumptive users (agriculture, for instance) believe that there is no unappropriated water available and, therefore, the establishment of MSF's should require an expansion of the water supply. The historical solution to this matter has been impoundment. This philosophy is challenged by persons who encourage the alternative way of increasing the supply through improved management and conservation. How much information on the availability of water affects the WPRB's decisionmaking in establishing MSF is not clear, although the WPRB's rules for implementing the Act specifically state that the WPRB will consider availability in its decisions (Sherton 1984).

Confusion exists regarding the options of the WPRB in MSF adoption, modification, or rejection. Quantity and availability of water certainly are factors and are subject to different interpretations. A wide variety of stream measurement methodologies are utilized; some of which use monthly flows while others use a 7-day measurement. Some sources believe that a standardized measurement process would provide better information for decisionmaking concerning minimum instream flows (Sherton 1984).

All parties agree that SB 225 demonstrates greater commitment to the establishment of MSF's in both the short term and the long term. It also provides very specific priorities and guidelines that will improve the process of instream flow reservation that has existed in Oregon since 1955.

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## WITHDRAWAL FROM APPROPRIATION

### OPPORTUNITY

Though the Oregon legislature has withdrawn certain lakes and stream reaches from appropriation to preserve scenic and recreational features and to reserve flows for fish life (see ORS 538.110), most of these legislative withdrawals took place before the creation of the WPRB in 1955. There has never been a general statutory moratorium on stream appropriations. There are, however, statutory provisions for withdrawal of streams from appropriation by administrative means. Under the present laws, the Water Policy Review Board has the authority to withdraw streams from appropriation (ORS 536.410). The Water Policy Review Board has administrative authority to withdraw a stream from appropriation. A withdrawal ruling can be a withdrawal "in perpetuity," subject to repeal by the Board. In the past, the Board has interpreted the withdrawal power as the power to withdraw a stream from appropriation on a temporary basis by means of temporary administrative rule, which has a time limitation of 6 months (Nelson et al. 1978). The rules in SB 225 (see pp. 30-32) call for the WPRB to initiate withdrawal proceedings if there is and will continue to be insufficient water to meet proposed minimum stream flows, and the WPRB does not find establishment of minimum flows to be less important than other uses of the water (Sherton 1984).

### BACKGROUND

The withdrawal power of the Water Policy Review Board can be exercised to ensure compliance with State water policy and to protect the public interest. A notice and a public hearing are required before such a withdrawal can occur.

Oregon divides administrative policy-setting power between the Water Policy Review Board (WPRB) and the Director of the Department of Water Resources. Therefore, it is difficult to identify where appeals and pressure will result in the most favorable results for reserving instream flows. The Board has the highest level of authority for creating policy decisions, and the Director of the Department of Water Resources is legally bound to adhere to the Board's directions. On the other hand, the Board operates by considering specific questions put before it by the Director of Department of Water Resources and is dependent on the staff of that Department and other State agencies to furnish the necessary data and analyses on which to base actions. The Board can adopt policies and give general directives about their implementation, but is remote from the day-to-day management of water resources. The

result is that the Department of Water Resources Director has considerable responsibility for policy in that he or she interprets the Board's policies and directives and translates them into specific plans and actions. Application of this opportunity to withdraw appropriation of a stream requires convincing the Board, the Water Resources Department, and the public that such a move is necessary. That effort probably will require all of the following:

- Rapport and cooperation between the resource agencies and the Water Resources Department to ensure that significant fish and wildlife needs are brought to the Board's attention in a form that will result in an administrative ruling;
- Availability of convincing and comprehensive data to present to the Board in support of requests for rulings; and
- An effort to inform the public of the potential adverse effects on fish and wildlife resources if no withdrawal takes place economic, as well as the less tangible, values of these resources (Nelson et al. 1978).

#### EXAMPLE

The Water Policy Review Board has used its power to issue an administrative rule to close a stream to further appropriation in a number of circumstances. For example, a statutory withdrawal (ORS 538.270) on further appropriation on the Rogue River was made in 1959. This action was amended in 1967. Controversy has occurred over the Gold Hill Project on the Rogue river, which was protected from hydroelectric development in its Basin Program. The site is an abandoned hydroelectric project and diversion dam. A U.S. Corps of Engineers (COE) project, Lost Creek Dam, is upstream. This project was built with an emphasis on enhancing fishery resources and protection of fish and wildlife. The applicant for a Federal Energy Regulatory Commission (FERC) license to develop a hydroelectric project at Gold Hill has met with opposition from the Department of Environmental Quality in issuing a water quality certificate because of unsolved water rights problems. FERC does not need to address the State's water rights when issuing a license because applicants are not required to hold water rights at the time of license issuance (Story 1984). Furthermore, if Oregon has not granted or denied a water quality certificate within 1 year, FERC will interpret this delay as a waiver of the certificate and may still grant the applicant a license.

At the same time the ODFW assumes it has claims at Gold Hill based on the State's Basin study that implies that the Rogue River is withdrawn from further appropriation for hydroelectric projects. The question between these claims is not yet resolved, and it remains to be seen whether or not FERC will issue the license. Intense pressures existed within the Legislature during 1981 and 1983 to create a statutory exception for Gold Hill (Sherton 1984).

## EVALUATION

Administrative and legislative withdrawals from stream appropriation clearly are available and practiced under Oregon law. The protection of the instream flows, already established by law for fish and wildlife, is more assured when overappropriations are prevented. Policy has changed with regard to issuing water rights without considering the total amount of water available for use. With withdrawals in effect, there are fewer junior permittees concerned about economic losses during water shortage periods unless they are allowed priority over minimum stream flows for fish and wildlife. It always is possible that the streambed will become dry despite the priority of the instream flow.

The power to order a withdrawal is a discretionary power vested in a citizen policy-making board (WPRB) that is sensitive to public opinion and political pressures. The amount of support varies from area to area around the State. Even if a withdrawal is created by the Board on a particular river at a particular time, it can be withdrawn by a subsequent administrative rule. The withdrawal is, at best, a temporary solution. Fish and wildlife agency sources point out that this strategy has been used in a piecemeal fashion, that it has no particular value as a precedent, and that it does not affect the comprehensive water plan. The strategy does, however, reflect public interest and priority. Although it is not binding, it may influence licensing (such as the FERC example) by offering a solid well-developed program or plan of water use evaluation.

An administrative decision within the Water Resources Department not to curtail appropriations on streams for which minimum flow requirements have been set can work directly against any WPRB action to implement statutory policy to maintain "perennial stream flows sufficient to support aquatic life and to minimize pollution" (ORS 436.310).

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## CLASSIFICATION OF WATER

### OPPORTUNITY

The Water Policy Review Board (WPRB) has statutory power to classify or reclassify water "as to highest and best use and quantity of use" (ORS 536.340). The Board, by so doing, can either limit the uses or quantities of use of the classified waters or indicate preferences for their future use.

### BACKGROUND

Most of the basin programs adopted by the WPRB involve a general "unrestrictive" classification. Many specific streams, rivers, or lakes have a more "restrictive" classification. The general "unrestrictive" classification includes 10 types of use for all basins: "domestic, livestock, municipal, irrigation, power development, industrial, mining, recreation, fish, and wildlife" (ORS 536.300). Temperature control, fire control, and agricultural uses have been added in a few basins (Sherton 1981:394).

### EXAMPLE

The Water Policy Review Board has exercised its power to classify streams for particular beneficial uses. Classifications of streams in the coastal basin area has been helpful to fish and wildlife interests. Streams in the north coastal area have been classified to preclude all downstream diversion for irrigation, municipal, and industrial use. This action is in addition to the establishment of minimum streamflows at some stream points. Streams in the basin have been classified for the following uses: Human consumption (by individuals, not municipalities); livestock; power use not to exceed that necessary for production of 7.5 theoretical horsepower; and instream uses for recreation, fish, and wildlife. Streams that have been so classified include those in the Tillamook Basin area, Daily Lake and tributaries, Sand Lake, and Netart's Bay (Nelson et al. 1978). Many of these streams are located in wild mountainous areas, where irrigation is not practical and municipal use is not a factor. The Department of Fish and Wildlife, or its predecessors, the Oregon Game and Fish Commissions, were able to convince the Board that such limited classifications were justified in this type of area.

## EVALUATION

Restrictive classifications can help preserve minimum stream flows on watercourses whether or not the Board has adopted minimum flows. Classification can prohibit appropriation of the remaining unappropriated waters for consumptive uses if no minimum flow has been adopted. If minimum flows have been adopted, consumptive appropriations junior to the minimum flow can be prevented, thus reducing situations where junior rights holders lobby the Board to suspend or waive minimum flow requirements during low flow periods (Sherton 1981).

There are two important limits on the value of restrictive classification in preserving instream flows. First, classification cannot affect watercourses that have no unappropriated water available to maintain instream flows. Second, the WPRB has the statutory requirement to preserve adequate water supplies for human and livestock consumption (ORS 536.310). Restrictive classification must still allow these appropriations and, therefore, cannot guarantee that water will remain unappropriated (Sherton 1981).

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## DISCRETIONARY WATER PERMIT AUTHORITY

### OPPORTUNITY

Discretion may be exercised on two administrative levels in Oregon: either the Water Policy Review Board, the Water Resources Department Director, or both, make decisions that affect the granting of water permits (Enviro Control 1976).

The Water Policy Review Board, in connection with its responsibility to formulate an integrated, coordinated program for the use and control of State water resources, has the authority to issue general policy statements, set minimum instream flows under the State minimum streamflow law (see p 26), and classify streams as to beneficial use (see p 26). Recreation, wildlife, and fishery uses are declared beneficial uses by ORS 536.300.

Once the Board has classified a stream as to beneficial use, it is the responsibility of the Water Resources Department (WRD) Director to issue permits only for those beneficial uses for which the Board has classified a particular stream. If the Director of the WRD believes that a proposed appropriation may be prejudicial to the public interest or that the appropriation is to develop hydropower greater than 100 THP, he or she may refer the matter to the Board. After a public hearing the Board determines whether or not the proposed use would be detrimental to the public interest and adopts an order approving or rejecting the application on that basis (Sherton 1984). The Board is guided in its determination of the public interest by statutory criteria (ORS 537.170). There are no rules to determine which applications should be referred to the board, however. The Director has taken the position that any use consistent with the Basin Program is in the public interest and has only referred a few questionable permits to the Board (Sherton 1984).

The Water Resources Department Director, who actually grants permits, also has discretionary power. He or she may approve applications and impose such terms and conditions on permits as are necessary to protect the public interest (ORS 537.190).

### BACKGROUND

Resource agencies, such as the Department of Fish and Wildlife, may influence the discretionary power of the Water Policy Review Board by contributing members to study committees, participating in public hearings on policy matters, and establishing a good working rapport with concerned officials of

the Water Resources Department (see pp. 26-30). The permit application procedure also has a built-in mechanism for getting input from fish and wildlife interests.

The WRD can include any condition necessary to protect existing public rights and interests in a water permit. For example, a permit may state that a reservoir can be filled only in winter when there is excess water, irrigation or mining use permits may be issued on a seasonal basis, or conditions as to rate of flow may be set up, or a right may be issued with the quantity of water diminishing over time as other uses are anticipated to require more water. Restrictions on the amount of time allowed for beginning and completing the project are included in all permits to prevent applicants from acquiring an early priority for a future use. The WRD may cancel any permit where the permittee is not using the water according to the permit restrictions.

The permit application procedure requires a 30-day waiting period after each water permit application is filed to allow any interested party to protest the application. The Water Resources Department compiles a weekly list of all new permit applications. A copy of this list is sent to the Department of Fish and Wildlife (DFW) and other interested agencies, giving them an opportunity to protest the application.

When an application conflicts with fish or wildlife use, the DFW first attempts to negotiate with the applicant for a stipulation of an instream flow reservation in the permit (Nichols 1984). The applicant, knowing that a protest might be filed, may be willing to comply with the DFW's request in order to expedite approval of the application. According to a member of the Oregon DFW, the Water Resources Department encourages the negotiation of stipulations. If negotiations with the applicant are successful, the application is refiled with the agreed conditions and stipulations and approved as revised. The DFW may elect to file a protest if the applicant does not agree to a stipulation. A protest must allege either injury to the water right of another holder or prejudice to the public interest. The next step is a hearing, with the Director of the Department of Water Resources usually serving as hearing officer. This ends the process ordinarily. After the hearing, the Director normally either grants the permit as applied for or imposes conditions and restrictions before granting the permit.

To implement this strategy, the Department of Fish and Wildlife must review proposed water permit applications, determine whether or not a given application concerns a stream that has been classified for fish and wildlife use, negotiate with the applicant, and, if necessary, prepare a protest. No special costs are incurred by the DFW in working up data for permit protests because the DFW has access to the results of comprehensive basin studies.



## EXAMPLE

The Booher project on Bennett Creek illustrates the successful use of Oregon's water use permit system to get an instream flow condition included in a water permit. The Booher Diversion Dam on Bennett Creek, eight miles southeast of the city of Drain in eastern Oregon's Douglas County, regulates a 1 mile reach of a small creek in the Umpqua River system. Although there is no minimum streamflow set for Bennett Creek, the Umpqua system has been classified by the Water Policy Review Board with fish and wildlife as the beneficial use. The serpentine stream flows through a 0.74-mile wide shoestring valley used mainly for cropping and grazing. There are beaver dams on nearby Beaver Creek. Heavy cover and appropriate water conditions support a coldwater fishery in Bennett Creek.

The parties involved in this project were the dam builder, Michael D. Booher of Yoncalla, Oregon; the permit authority, the Oregon State Engineer (now the Oregon Department of Water Resources, Permit Division); and the Oregon State Game Commission (OSGC) (now the Oregon Department of Fish and Wildlife.)

The main purpose of Booher Dam is the diversion of water from the creek for irrigation. Mr. Booher requested a permit from the State Engineer in 1971 to appropriate 2 acre-feet of water from Bennett Creek. His proposal included plans to build an in-channel, 6-ft high, concrete-and-wood dam with concrete abutments and removable stoplogs. The OSGC conducted a field investigation after being notified of the proposed development. After "eyeball" field observations, the Commission recommended a minimum flow of 0.1 cfs below the dam from June 1 to October 1 to provide potholes as rearing habitat for steelhead, salmon, and resident trout. The Commission also requested that the stoplog be removed from October 1 to June 1 to allow fish passage upstream and downstream. Mr. Booher agreed to the flow and passage recommendations in return for a promise that the State Game Commission would not protest his application. This stipulation agreement was included in the water-use permit granted to Mr. Booher by the State Engineer in 1972. The ability of the OSGC to protest the permit, together with of an OSGC biologist's statement that the recommended flows would maintain certain fish species without significantly impinging on irrigation uses, were the reasons Mr. Booher gave for agreeing to the stipulation.

No gaging station is located below the dam and no follow-up study has been conducted. However, circumstantial evidence indicates that the recommendations are being implemented. The dam was constructed with a low-level outlet so that water can be released to maintain the flow when natural flows are insufficient to spill over the dam. Mr. Booher states that the permit requirement and pressure from downstream users ensures that at least the recommended amount of water will be released (Nelson et al. 1978). Preproject flows generally have been maintained. According to the dam operator, summer flows are higher than preproject flows because of the retention of water during high-flow periods by the dam and because of the dam's low-flow release capabilities.

Costs resulting from the Department of Fish and Wildlife's action on the Booher project mainly were incurred for staff time required to make field observations and negotiate with the permit applicant.

## EVALUATION

As the Booher illustration shows, this strategy can be successful even on small streams where minimum flows have not been set. Negotiation between the Department of Fish and Wildlife and permit applicants can streamline the process by making formal protest and administrative hearings unnecessary. The protest power gives the Department of Fish and Wildlife useful leverage in convincing applicants to consider fish and wildlife needs in their appropriations. The negotiation step provides flexibility so that stipulations can be tailored to the situation. For example, an applicant might agree to stipulations for one project in return for a promise not to protest another project.

According to the Department of Fish and Wildlife, the Department of Water Resources does not often take the initiative in referring applications to the Board unless instream flow matters, such as fish and wildlife needs, are at stake. (Kline 1984; Nichols 1984). There is considerable reliance on agencies such as the DFW and the DEQ to carefully monitor such needs and bring them to the attention of the WRD. The WRD generally is receptive to the Department of Fish and Wildlife's recommendations, especially when information is backed up with recent data (Kline 1984).

A significant legislative and administrative constraint on this strategy is the beneficial use classification that the Board has assigned to the stream in question. The Department of Water Resources will have no basis for the permit on fish and wildlife grounds if the stream has not been classified for fish and wildlife use. The Department of Fish and Wildlife will have no leverage in negotiation with the permit applicant in this case, because the protest power will not be applicable. Some Department of Fish and Wildlife sources believe that other statutory authority exists that should allow a protest to be entertained despite the beneficial use classification of the stream (Nelson et al. 1978). In the Booher case, the stream was part of a system classified for fish and wildlife use; consequently, the views of the Department of Fish and Wildlife on stream flow requirements had some influence in the negotiation process.

Another constraint on this opportunity is a practical one. The costs involved in this strategy are chiefly those of gathering the necessary biological and hydrological data and collating it effectively for use in negotiation with applicants, or, if necessary, as the basis for arguments in support of a protest. Obtaining accurate data on small or inaccessible streams is difficult. It may be difficult to quantify the amount and nature of damage resulting from a project on these streams. There was no stream gage by which to measure flows, and in the Booher project the "eyeball" technique had to be applied (Nelson et al. 1978).

Another constraint is the piecemeal nature of project-by-project negotiation and protest. A negotiated permit stipulation has no value as a precedent.

A successful protest, on the other hand, may be of value as a precedent, because a hearing will have been held and the Director must have issued an opinion in support of his or her decision. Each permit application is considered separately and, according to Department of Water Resources procedures, worked out and resolved without administrative proceedings as often as possible. The protest procedure requires the Director to issue an opinion that sets forth the reasons for his or her decision following a hearing. Such opinions may serve to guide future decisions in similar cases.

The Oregon Department of Fish and Wildlife personnel indicate that this strategy will continue to be successfully applied in the future in cases where the Department has enough information to make a good case for issuing a conditional permit and where the stream classification gives fish and wildlife interests a legitimate reason for invoking the public interest (Nelson et al. 1978).

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## SCENIC WATERWAYS

### OPPORTUNITY

The Oregon Scenic Waterways Act (ORS 390.805 to 390.925) was passed by initiative petition in 1970. It is to be construed in the same general manner as a statute enacted by the Legislature [38 Opinion Atty. Gen. 697, 698 (1977)]. This Act indirectly provides for protection of instream flows by setting up a system that requires the WPRB to carry out its planning responsibilities in a way that maintains the free-flowing character of a stream in quantities necessary for recreation, fish, and wildlife uses [ORS 390.835 (1) and (4)]. It is essentially a land-use act that regulates private land use along the banks of designated rivers. Designation of streams as Scenic Waterways can be accomplished by a procedure provided in the Act or by direct legislation. Primary emphasis is given to protecting the scenic beauty, fish and wildlife, and scientific and recreation features, based on the special attributes of each area (ORS 736-40-020).

### BACKGROUND

The Scenic Waterways Act is administered by the Oregon Department of Transportation in conjunction with certain other State agencies, including the Water Resources Department and the Department of Fish and Wildlife. The Department of Transportation, with the concurrence of the Water Policy Review Board and certain other State agencies, may recommend, to the Governor, additional rivers or segments of rivers for inclusion as scenic waterways. If the Governor accepts the recommendation, the water source is included in the scenic waterway system unless this action is disapproved by the Legislature at its next regular session (ORS 390.855).

The policy of the Act is based on findings by the people of Oregon that many free-flowing rivers and adjacent lands in Oregon possess "...outstanding scenic, fish, wildlife, geological, botanical, historic, archeologic, and outdoor recreation values of present and future benefit to the public" (ORS 390.815). The Act prohibits dams and obstructions except under special conditions. Where dams and other impoundment facilities exist, a complementary policy preserves other selected rivers or sections in a free-flowing condition. Restrictions are imposed on the manner in which the land adjacent to such a waterway can be used. Provision also is made for acquiring abutting shoreland to protect the scenic characteristics of the waterway. New water diversion structures are only permitted if approved by the Water Resources Department

Director as being necessary for certain uses and consistent with legislative policy [ORS 390.835(1)]. To date, the Director has approved all new diversions and has not referred any applications to the WPRB (Sherton 1984).

#### EXAMPLE

An individual requested placement of a small hydroelectric generating facility within the Sandy River Scenic Waterway, on a tributary of the Sandy River in 1983. The Transportation Commission (the advisory group to the Department of Transportation) granted approval at first, but later denied the construction. The project earlier had received approval from the State Water Resources Department Director. Several citizens and organizations, including Multnomah County, challenged the Commission's review process by arguing that the project was prohibited by the Scenic Waterways Act. The contention also was held that authority to regulate such developments rested with the Water Resources Department Director (Lilly 1984).

An opinion was solicited from the Attorney General at the Commission's request and with the mutual assistance of the Director of the Oregon Department of Transportation and the Water Resources Department Director, regarding the Act, water use, and hydroelectric development. The Attorney General concluded that the dam proposed by the project was not permitted within the Scenic Waterway [ORS 390.835(1)]. The opinion stated that the Water Resources Director is vested with the power to review and approve water diversion projects within scenic waterways. Such approval must be consistent with the Commission's rules for scenic waterway management. Where the Act provides for more restrictive use of water than other established legislation, the Act applies. A recommendation was made that the Division of State Lands, Water Resources Department and Oregon Department of Transportation should enter into an intergovernmental agreement outlining their respective roles in Scenic Waterway Management (OP-5438).

#### EVALUATION

The statutory commitment of the Scenic Waterways Act that "the highest and best uses of the waters are recreation, fish and wildlife" (ORS 390.835) provides for protection of instream flows by implication. Protection of these public uses should be within the State's power because the benefits of these instream uses accrue to the public as a whole

Although the Scenic Waterways Act does not provide a direct means of establishing instream flows, reserved flows might be in sufficient quantities to meet the purposes of the Act. However, quantified flows that are sufficient for the purposes of the Act might not be sufficient to maintain a critical fishery.

This Act prohibits development of dams and reservoirs in designated segments and indirectly restricts, through its general policy statement, any water resource development upstream or downstream that would adversely affect the waterway. It would be a serious shortcoming to take this approach to

reserving flows without actually quantifying the streamflow regime that underlies the scenic waterway designation and monitoring and managing the flows to ensure their maintenance, possibly by reservoir releases upstream.

Future effectiveness of this opportunity depends on public awareness and support. A 35-mile segment of the North Fork of the Willamette River recently was added to the Scenic Waterways System. Waldo Lake, considered by many as the "purest lake in the world" is included in the original statutory designation because of environmentalists and fly fishermen who expressed concern that the scenic value of the lake would be threatened by hydroelectric development.

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## PURCHASE AND LEASE OF WATER RIGHTS

### OPPORTUNITY

Contractual arrangements to reserve instream flows include the direct purchase of flow rights, the leasing of rights, and the purchase of shares in a mutual water company. The legal basis of this opportunity lies in the provisions of ORS 496, which implicitly empower the Oregon Department of Fish and Wildlife to purchase direct flow rights, to buy shares in a mutual water company, or to lease water for instream use. The Oregon Water Resources Department presently interprets the State law as meaning that a point of diversion is necessary to make the purchased water right valid. Private parties or organizations could purchase shares to acquire instream rights and leave their entitled water in the stream.

### BACKGROUND

According to an Oregon Department of Water Resources source, no water rights permits can be issued for instream flows in Oregon. Instream flows can be reserved under the minimum stream flow law (see p. 26), but such a reservation is not viewed as a water right because it is subject to administrative review, revision or suspension under the Statute (ORS 536.325). There is no Oregon law that prohibits the purchase and transfer of a water right. However, the right might lose its validity if the water was left in the stream; diversion is a necessary legal prerequisite to appropriation. The validity of permits transferred for such a purpose would have to be decided on a case-by-case basis. Another difficulty in purchase and transfer of a water right from a consumptive user to an instream user is the difficulty of enforcing the right even if it should prove valid. No mechanism exists in the law to ensure that water left in the stream under such a permit would not be appropriated by another user for an out-of-stream use and returned to the stream at a point further downstream.

The Department of Fish and Wildlife has no program for purchasing water rights at this time. The Department probably could lease water, but is not doing so. This approach provides only an interim solution but may be applied to protect a valuable fishery in a particular stream where no permanent supply of flows is available for purchase. The technique of purchasing shares in a mutual water company is applicable to either private parties or the Department of Fish and Wildlife. The Department already is a member of an irrigation company in connection with the purchase of some wetlands.

A mutual water company is a corporation, usually organized by landowners to acquire water for domestic and agricultural use in a designated area. Shareholders receive a pro rata amount of water based on the number of shares they own in the company. To apply this opportunity, a private party or conservation organization would acquire water rights through a purchase of shares in a mutual company and leave their entitled water in the stream.

The major cost of implementing this opportunity is the price of water rights, which has risen dramatically in the last few years and probably will continue to rise. However, the acquired water right might be sold to be diverted at a point downstream where few instream values worth preserving exist, thereby defraying part of the acquisition cost. Other costs include personnel and studies to identify streams where a purchase would have the greatest benefit, as well as a substantial cost for the negotiation of the purchase.

#### EXAMPLE

This opportunity has not been used in Oregon to date.

#### EVALUATION

Contractual arrangements for the enhancement of instream flows have not been used to a great extent in western States, but could have potential for future use in Oregon. The principal constraint on this opportunity is the requirement for a point of diversion and the vague legal guidelines about whether or not an instream flow right could be enforced against downstream diversionary users. The cost of water rights, which are expected to continue to rise as more demand is made on the resources, may be an additional constraint.

The Oregon Department of Fish and Wildlife might be authorized to lease water for instream use when no flow rights are available for sale. Leasing arrangements incur the following additional constraints:

- (1) Leasing is only an interim solution; and
- (2) Leases may be subject to conditions that are expedient for the vested claimant rather than the lessee.

The purchase of shares in a mutual water company may be advantageous when no private rights are available either for leasing or purchase. Purchase might be made by a private individual or organization or by the Department. Other problems arise in this approach. First, there is a question as to whether or not shares in a mutual water company can be used for instream purposes. Second, such a use probably would be challenged by existing users.

This strategy is very promising despite the potential constraints. It provides a direct way to legally protect instream flows. It also provides an opportunity to acquire senior water rights, an increasingly important factor in a State where many streams are fully or overly appropriated.



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## RIPARIAN ZONES

### OPPORTUNITY

The Oregon Department of Fish and Wildlife began offering property tax relief for streamside lands enrolled in its Riparian Land Tax Incentive Program in 1983. This program provides property tax exemptions to private landowners for lands that adjoin a stream if a cooperative management plan has been worked out with the Department and if the County where the land is located has an acknowledged land use plan (Faast 1983).

### BACKGROUND

The need to maintain and improve riparian zones, has long been recognized as necessary for the protection of fish and wildlife habitat. The vegetation along riverbanks provides cover, and shades the water during the summer.

Eligible land is defined in a county land use plan, which is approved by the Land Conservation Development Commission (LCDC). The land is zoned as agriculture, forest, or range. The management plan must be agreed on by the landowner and the Department of Fish and Wildlife. The plan must include objectives and steps to implement improvements. The agreed-on management plan remains in effect indefinitely unless the conditions of the agreement are broken, in which case the owner will be required to pay up to 5 years of back taxes.

Landowners also are offered an income tax credit for up to 25% of private expenditures for instream habitat improvement projects under this program. These projects could include gabions, fish passage improvements, bank stabilization efforts, and fencing.

### EXAMPLE

This opportunity is now available in 19 counties. Participation currently includes 158 acres of riparian land and 15 miles of streambank. The remaining 17 counties in Oregon did not meet the recommended June 1984 deadline for application of eligibility because they had not adopted an accepted land use plan. The majority of Oregon counties are expected to have their land use plans completed by January, 1985 (Faast 1984).

## EVALUATION

This program has long range benefits for the preservation and enhancement of instream flows. Studies have shown that the natural storage and release characteristics of riparian zones double the benefits to fish and wildlife by providing food and cover, in addition to essential water when it is needed the most. Participation in the program is immediately beneficial to landowners, which encourages further riparian zone improvements (Faast 1983).

The small, agriculturally intensive counties in western Oregon have responded favorably to this opportunity because it is financially beneficial for many landowners to have their property removed from the tax rolls. However, the tax breaks do not compensate for the costs of meeting the eligibility requirements of the program in the dry, cattle ranching counties of eastern Oregon.

Future efforts in this program will include a Statewide newspaper educational campaign and distribution of a brochure, further data gathering from individuals affected by the program for presentation to the Legislature, and attempts to allocate more money for implementation so that immediate profits to landowners are feasible (Faast 1984).

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## MULTIAGENCY WATER MANAGEMENT PLAN

### OPPORTUNITY

The 1983 Session of the Oregon Legislature passed SB 523, a water planning program that required the Governor to create a Strategic Water Planning Group. Members of this group represent all of the State's natural resource agencies and the Governor. The Strategic Group is charged with developing a Statewide management strategy. Most water-related management decisions in Oregon have been made by individual agencies and local governments, although the acquisition of water rights always has been under the control of the WRD and its predecessor agencies. Many of the directives in the Multiagency Water Management Plan include the identification of minimum stream flows necessary to satisfy instream uses for each segment of a basin [SB 523, Section 4(1)(j)]. Another directive to the Strategic Water Planning Group is the creation of a natural resources data base system with input from all the agencies of the water-related information accessible to them.

### BACKGROUND

The growing complexity of water management processes in Oregon has created a need for coordination of the many efforts of all the resource agencies. Although the resource agencies always have had opportunities for input on basin studies (discussed above in "Reservation of Instream Flow") on a voluntary basis, they are required to be represented on the Strategic Water Planning Group under this Legislative Act. Phase I of Strategic Water Planning was funded to gather resource data, develop a geographic information system, and develop and implement a public involvement program in 1 year. Phase II presumably would include the development of alternatives and recommendations to the WPRB for implementation during year 2. A decision on the extent of Phase II activity will be made by the 1985 Legislature (Bartels 1984).

The main purpose of this Act is to facilitate the involvement of all State natural resources agencies in the planning process and to use the same data whenever recommendations are made. Each agency is required to develop a work plan to be submitted to, and coordinated by, the Strategic Group.

The changes in the basin study process are few, but significant. Three advisory committees are created for each study: local; technical; and policy. The main authority is the Governor, with the Water Resources Department acting as the lead agency. There is some confusion about the interpretation of the Act, with some persons believing that it is a major revamping of the State

resources planning process and others viewing it merely as clearer and more concise direction for completing a basin study (Sherton 1984). The second phase, implementation, has not yet been funded.

#### EXAMPLE

The John Day River Basin is being studied as part of Phase I of the water management plan. This Basin is geographically large but not heavily populated. All nine State resource agencies and the Governor were gathering data about this Basin by January, 1985. The process also includes the public, interested organizations, and Federal and local government agencies.

#### EVALUATION

The significance of this program as an opportunity to preserve instream flows is not obvious at this time. The Oregon Fish and Wildlife Service always actively participates in the Basin Study process and, along with other agencies, has defended the establishment of minimum stream flows for the promotion and stabilization of fish and wildlife. Under the Legislative direction of SB 523, all agencies and citizens have a stake in the overall management of water resources and will, by necessity, consider the entire range of issues involved.

Concerns of participating agencies have centered around the time and financial constraints of the Act. The Legislature reviewed the Phase I data in January, 1985, which allows less than half the time usually allocated for a Basin Study. Funding has been appropriated for Phase I, but not for Phase II, which involves implementation.

The Multiagency Water Management Plan is a Legislative response to Oregon's realization of the importance of cooperation in planning for its limited water resources. Water management is a political issue, with problems compounded by modest financial resources.

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## CONDEMNATION AND REALLOCATION OF WATER RIGHTS

### OPPORTUNITY

According to the Office of the Attorney General, the Oregon State Constitution allows the condemnation of a water right by the State, or by a political subdivision of the State, because a water right is a property right and all property rights are subject to the State's power of eminent domain (Nelson et al. 1978). Cancellation and reallocation of abandoned water rights occur under the 5-year forfeiture rule (ORS 540.610).

### BACKGROUND

Whether or not the State's power of eminent domain extends to a State department, such as the Department of Water Resources, depends on the statutory powers of the Department in question. It is the opinion of the Department of Water Resources that although this power is constitutionally available to the State, it is not available to the Department because the special power of eminent domain has not been designated by the Legislature (Nelson et al. 1978). The Department of Transportation, Parks and Recreation Division, has this power but has never condemned water rights.

A water right is presumed to be abandoned whenever the owner of the right ceases or fails to use the appropriated water for a period of 5 successive years. If the owner is not using water according to the stipulations and conditions of his or her permit, the Department of Water Resources can revoke the permit. In both cases, the water reverts to the public for future appropriation. It could then be reallocated in the public interest and reserved under the instream flow law (see p 26). The right would go to the next junior user and all rights, including minimum stream flow, would take a step up in relative priority (Sherton 1984).

### EXAMPLE

Condemnation and reallocation have not been used in Oregon to date.

### EVALUATION

Oregon has not utilized the condemnation opportunity due to the relatively high expense of the process. The burden of proof lies with the State in the 5-year forfeiture ruling, and information provided by the Basin Study Plans is

expensive and time consuming to obtain (Achtermann 1984). There is discussion of instituting an affidavit system whereby water users would register proof that their water is being used in the way designated by the permit. This system could identify water rights that should be cancelled.

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PART III. WASHINGTON



## WASHINGTON

by  
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### INTRODUCTION

The Cascade Mountain Range, which extends north and south through central Washington, separates two widely diverse climatic regions. Precipitation in the western portion of Washington, which generally has a mild climate, may exceed 100 inches annually. An extensive seashore, which includes the excellent harbor facilities of the Puget Sound area, and the abundant lakes, streams, and rivers of the Columbia Basin, contribute to the widespread reputation of the State as being free from water shortage problems. In western Washington, however, many streams and rivers provide water for offstream uses, such as municipal and industrial supply and hydroelectric power generation. Conflicts between instream and offstream uses are occurring with increasing frequency in this part of Washington. Summers often are quite dry, and stream flows may fall to very low levels.

Eastern Washington is characterized by much drier conditions throughout the year and temperature extremes from season to season. The major irrigation projects that divert water to support the State's agricultural industry and the major hydroelectric developments are east of the Cascade Range. The increasing and conflicting demands on Washington's water, along with its unusual climatic conditions, have caused the State to continually evaluate its water laws and water management procedures. The resulting programs are innovative and noteworthy, particularly in regard to their awareness of the need to preserve instream values.

Initially a Riparian Doctrine State, Washington adopted the appropriation doctrine as the exclusive means of allocating the use of surface water in their 1917 Water Code (Ch. 90.03 RCW). In 1945, the State Water Code extended the appropriation doctrine to include ground water (Ch. 90.44 RCW). Two statutes (Ch. 90.22 RCW and Ch. 90.54 RCW) provide mechanisms for reserving instream flows; they are explained further in "Reservation of Instream Flow." The Washington Legislature, through these Acts, has demonstrated its commitment to a certain level of protection of instream resources as part of its water management program. These Acts undoubtedly were influenced by the commercial importance of anadromous fish for food and sport. Emphasis has been placed on the State's obligation to tribes under treaties to protect fish and their habitat since 1974 [U.S. v. Washington, 384 F. Supp. 32 (Feb. 1974)].

## ADMINISTRATIVE CONTROLS BY THE WASHINGTON DEPARTMENT OF ECOLOGY

Washington water resources are administered and managed by the Department of Ecology (WDOE). The WDOE is mandated by statute (RCW 90.54.040) to develop and implement a comprehensive State water resources program. The administrative head of the Department is the Director, who is appointed by the Governor. The Director is responsible for carrying out all the powers and duties of the Department, with advice from the State Ecological Commission (RCW 43.21 A.170), also appointed by the Governor. The primary goal of the water resources program is to ensure that the waters of the State are properly allocated to achieve full utilization for the greatest benefit to the people of the State and to regulate uses in accordance with established rights. The primary objectives of the program include the protection and preservation of instream values, while balancing the administration of other beneficial uses of water.

## APPROPRIATION OF INSTREAM FLOW

### OPPORTUNITY

Washington has two statutes that provide mechanisms for appropriating instream flows. The Minimum Water Flows and Levels Act (Ch. 90.22 RCW) of 1967, revised in 1969, provides a formal process by which the Washington State Department of Ecology (WDOE) can set, by administrative regulation, both "minimum stream flows" and "minimum lake levels" to protect fish and wildlife resources, recreational or aesthetic values, and water quality (RCW 90.22.010). This Act sets forth hearing procedures for establishing minimum stream flows, but it does not define criteria for determining the flows (RCW 90.22.020). The Water Resources Act of 1971 (Ch. 90.54 RCW) further provides that "base flows" necessary to maintain navigation and to preserve wildlife, fish, scenic, aesthetic, and other environmental values shall be maintained in perennial streams. This Act declares "fish and wildlife maintenance and enhancement," among other uses, to be beneficial [RCW 90.54.020(1)].

Pursuant to these Acts, instream flows are set by administrative regulation as a part of a Basin Management Program or, more recently, the Washington Instream Resources Protection Program. An instream flow established under these statutes constitutes an appropriation with a priority date corresponding to the effective date of the regulation (RCW 90.03.345). The Department of Ecology has the authority to close a stream to further appropriation and establish instream flows under this program (see pp. 79-82).<sup>5</sup>

The effectiveness of both minimum flows set under Ch. 90.22 RCW and base flows set under Ch. 90.54 RCW is enhanced by an earlier statute, RCW 75.20.050, passed in 1949. This statute authorizes the water rights administrator (now the Department of Ecology), on the advice of the Directors of the Department of Game (WDG) and the Department of Fisheries (WDF)<sup>6</sup> (two separate departments in Washington), to refuse to issue a permit that might result in lowering the flow of water below that necessary to adequately support fish populations (see pp. 65-68). This statute also authorizes administrative action to close streams to further appropriation (see pp. 79-82).

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<sup>5</sup>The terms "minimum flows", "base flows", and "instream flows" are considered synonymous by the Department of Ecology [Okanogan River Basin Water Resources Management Program, 1984 (Ch. 173-659 WAC)]. The term "instream flow" presently is preferred (Slattery 1984).

<sup>6</sup>The Washington Department of Game is responsible for wildlife and game fish, while the Washington Department of Fisheries manages fish used for food consumption.

Within the State water code, there is neither provision for, nor prohibition against, an agency or private individual obtaining a normal appropriation permit and certificate of water right for instream fish and wildlife use through the standard appropriation process. The legal status of such an appropriation would be uncertain because of the inability to describe, in specific terms, a point of diversion and appurtenant place of use. Because the legislature has provided other appropriate mechanisms to protect instream flows, the Department of Ecology has discouraged attempts to obtain water rights for instream use (Slattery 1984).

## BACKGROUND

The parties primarily involved in formulating and applying this opportunity are the Washington State Departments of Game and Fisheries; the Department of Ecology, which has the task of formulating a comprehensive water plan; the general public; and Indian tribes. Action results only after hearings have been held and input gathered from resource specialists that can be used to identify instream flow requirements for the stream in question.

No single, definitive methodology has been developed to measure stream flow requirements, although the Instream Flow Incremental Methodology (IFIM) is preferred. The WDOE cooperates with the WDF and the WDG to carry out IFIM studies in selected streams. Other less expensive and less time-consuming methods also are employed, such as the "USGS/WDF Method" and the Tennant (Montana) Method (Slattery 1984).

Minimum instream flows are established under the Washington Instream Resource Protection Program. After adoption of a minimum flow, a stream is protected from subsequent consumptive use appropriations. Any water right issued after adoption of a minimum flow is subject to that minimum flow, as if the minimum flow were a water right. When the flow of the stream falls to or below a specified instream flow level, those water rights junior to instream flows must cease or diversion must be reduced until the specified stream flow is satisfied (Washington Department of Ecology 1983). The WDOE had set instream flows on approximately 88 major streams in the State and closed approximately 187 streams and lakes to further consumptive appropriation as of 1984 (Slattery 1984).

Basin regulations are tailored to accommodate specific problems. These regulations may establish instream flows, confirm historical closures, define new closures, establish appropriation limits, and define management procedures and relationships.

## EXAMPLE

The WDOE Sixth Biennial Report to the Legislature (1983) stated that eight instream resource protection programs had been completed by January 1, 1983. Two of these, the Nisqually Basin and the Kitsap area stream are discussed below.

The Nisqually River is heavily utilized for the production of hydroelectric power. The City of Tacoma owns two large power dams (Alder and LaGrande), and the City of Centralia operates a long diversion canal for power production purposes. As a consequence of these projects, summer flows in the Nisqually River usually are reduced to an unsatisfactory level for fish. The river is a heavy producer of salmon and steelhead, which are important for commercial, Indian, and sports fisheries. The WDOE adopted minimum instream flows for the main stem Nisqually River and a number of tributaries in order to avoid further stream flow reductions by future developments.

In addition, McAllister Creek, an independent stream tributary to Puget Sound and within the Nisqually Basin, was closed to further consumptive appropriation in order to protect existing water rights, significant fish runs, and a new Department of Fisheries hatchery. The creek, at its headwaters (McAllister Springs), is the major source of the municipal water supply for the City of Olympia. The Nisqually Basin regulations are codified in Chapter 173-511 WAC.

The Kitsap area streams are small in size, but large in number. These streams contribute significantly to the population of chum and coho salmon in Puget Sound. Because of their small size, these streams are particularly sensitive to withdrawals. The WDOE adopted minimum instream flows for 21 major stream systems and closed numerous streams to consumptive use for all or part of the year to protect anadromous fish habitat and aesthetic values. Many of these streams had negligible prior appropriations. The Kitsap regulations are codified in Chapter 173-515 WAC.

## EVALUATION

The Departments of Game and Fisheries, and the Department of Ecology are enthusiastic regarding the application of procedures developed under the Water Resource Act of 1971 (Ch. 90.54 RCW). One WDF source said that, although the instream flows set on designated streams by the WDOE are not always optimum in the opinion of his Department, the "base flow" program (now referred to as the instream flow program) of the Water Resources Act of 1971 (Ch. 90.54 RCW) is the most significant program available for protecting flows, and it is working (Zillges 1984).

Several problems exist that have inhibited the progress of establishing instream resource programs. Federal funding (between 50 and 75% of the WDOE's total basin planning budget) was terminated in 1982 (Washington Department of Ecology 1983). The State legislature increased funding in 1983 and 1984, allowing WDOE to fully staff the program (Slattery 1984).

Another problem relates to the regulation or enforcement of adopted instream flows. The WDOE closes streams to further consumptive appropriation where existing or new diversions could seriously affect the welfare of the stream or where water for instream flows is not available. However, the WDOE normally prefers the establishment of instream flows over closures (Washington Department of Ecology 1983). Instream flows are more difficult to regulate, especially in dry seasons when agricultural interests are more critical (Beecher 1984). Fisheries interests are concerned that permit holders might

eventually have enough influence to take their claims for water into a local court of equity and challenge the legality of the base flow program. In addition, it may require considerable time to notify all of the water right holders who are subject to minimum flow if there are many diversions on a stream. This could result in a long delay between the onset of a low flow and the regulation of diversions (Beecher 1984).

It is important to note the power vested in the Washington Department of Ecology to act as a mediator between fish and wildlife agencies, irrigators, citizen groups, and the Legislature. It is current WDOE policy that each basin plan be reviewed within 5 years of implementation (Slattery 1984). A source from the Department of Fisheries has expressed concern over the two most recent reviews of basin plans by the WDOE, in which established flow requirements were reduced (Zillges 1984).

The WDOE reduced some instream flows and increased others in its 1984 revisions of the Okanogan Basin Plan (Ch. 173-549 WAC), in order to improve the enforceability of the regulations and to resolve inequities between upstream and downstream diverters. Fish resources should not be negatively affected by these actions. The WDOE believes that it is constrained by State law from adopting optimum flows for fish. Therefore, the Department sets flows adequate to protect and preserve instream values consistent with RCW 90.22.010 and RCW 90.54.020(3)(a) (Slattery 1984).

The WDOE is aware that few individuals or interest groups are fully satisfied with its final regulations but, to date, only one of the instream flow settings has been appealed. The appeal was filed by the City of Seattle and involves the Tolt River in Water Resource Inventory Area Seven (WRIA-07) (Washington Department of Ecology 1983).

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## INSTREAM FLOWS ESTABLISHED AS CONDITIONS TO WATER RIGHT PERMITS

### OPPORTUNITY

The legal basis of this opportunity for instream flow protection is legislation passed in 1949. This legislation supports the denial of water right applications when further appropriations "... might result in lowering the flow of water below the flow necessary to adequately support fish populations" (Ch. 75.20 RCW). The WDOE uses this authority, in conjunction with the public interest aspects of Ch. 90.03 RCW, to close streams to further appropriation. The WDOE also uses this authority and its general permit authority under Ch. 90.03 RCW on a case by case basis to establish low flow provisions on water rights, where denial of a permit is not necessary. The Minimum Water Flows and Levels Act of 1969 (Ch. 90.22 RCW) and the Water Resources Act of 1971 (Ch. 90.54 RCW) further provide for maintaining flows in streams for fisheries and other ecological values and help support closure decisions.

### BACKGROUND

#### Introduction

Responsibility for the management of Washington's water resources is vested in the Washington Department of Ecology (WDOE). The WDOE is responsible for processing and approving or denying applications for permits to appropriate public surface water. The procedures to be followed to perfect a water right are specified in the 1917 Water Code (Ch. 90.03 RCW).

This process begins when an application is filed with the WDOE and notice of the application is published in an appropriate newspaper of general circulation. A temporary permit occasionally may be issued (RCW 90.03.250), but the actual approval to proceed with construction is a standard appropriation permit (Bucknell 1984; Slattery 1984). The WDOE must determine that there is unappropriated water in the source, that the proposed use is a beneficial use, and that the proposed use would not conflict with existing rights or be detrimental to the public interest before it approves an application and issues a permanent permit. The WDOE can issue a permit with or without special conditions or limitations. It can deny an application for a permit where existing rights or the public interest require denial or where the stream is already fully appropriated (for an explanation of enforcement procedures see pp. 60-63).



## Discussion

Fish and wildlife interests can petition the WDOE to protect instream flow values in granting permit applications. The WDOE routinely sends all applications for surface water permits to the Department of Game and the Department of Fisheries for advisory comments.

These Departments evaluate the applications on a case-by-case basis. Each evaluation includes reviews by fish biologists and consideration of the results of field studies conducted during the low flow (summer) period. The biologists also consult the records of the Departments of Game and Fisheries for information about the stream involved and review previous protests and recommendations issued by each Department. After these investigations, the WDOE denies or conditions the approval of a permit if it believes the proposed use might result in lowering the flow of water in any stream below the flow necessary to adequately support food fish and game fish populations in the stream (RCW 75.20.050).

Evaluations can be expensive, including the costs of field studies of streams under consideration and to obtain hydrological and biological data to support the position of fish and wildlife interests. The proponent may need to hire a consultant to perform instream flow studies in larger development projects. Another cost factor is the time and effort of agency personnel to meet together as needed.

## EXAMPLE

The denial of the application for appropriation near Port Orchard, Washington, illustrates the successful application of this strategy by the Washington State Department of Game. The applicant proposed to appropriate water for a continuous domestic water supply from an unnamed stream tributary to Salmonberry Creek and for the irrigation of a tract of 1.5 acres located in Colby Garden Tracts. Analysis of the application itself provided some of the grounds for denial: (1) the legal description appearing on the application described approximately 3 acres of land; and (2) the attached map showed that the residence involved in the application was not located on that tract. "Domestic supply", according to current standard WDOE operating procedures, means normal use within a residence and normal maintenance of grounds not to exceed 0.5 acre and associated with a residence; therefore, the application did not qualify. A field inspection of the site by a WDOE examiner resulted in other grounds for denial: the ground was cleared for irrigation; the residence was not located on the property described as the place of use; and an old diversion system existed and apparently was being used for the irrigation of acreage in excess of that normally associated with domestic needs. A check of WDOE records showed that the stream system in question had been closed to irrigation by request of the Departments of Fisheries and Game since 1948 and that the applicant had been notified of that fact prior to submission of the application for domestic use.

Correspondence between the Department of Game and the Department of Fisheries further revealed that Salmonberry Creek was populated with coho salmon year-round, that their numbers were limited by low flows, and that further reduction in flow would reduce the population. The Department of Fisheries stated that the stream had been closed to consumptive diversion in 1948 and asked that the application be denied. The Department of Game joined in this recommendation. The fish and wildlife agencies incurred some expense in reviewing the application and filing the necessary information to document their protest.

The WDOE denied the permit, observing that an alternate source of water was available and that to issue a permit in degradation of established standards merely because the water was already being used would encourage noncompliance with the water code.

## EVALUATION

This opportunity has been successfully applied in Washington. A system for the review of water rights applications by the Departments of Game and Fisheries has been institutionalized. Applications are forwarded to the Departments for review, after which the Department of Ecology conducts reviews and field investigations. A records system is available and forms for recommendations also have been developed.

Procedures exist and often are employed for issuing permits with conditions. For example, the Departments may allow a diversion of a limited number of cfs and acre-feet per year, but require that the intake be screened, that no dam be built, and that all diversion shall cease when the stream flow falls below a specified number of cfs. Although these procedures exist, the employees of the Departments of Game and Fisheries believe that conditioned permits are much less satisfactory than denial (Beecher 1984; Zillges 1984). They believe that it is possible that once the user has a permit, he or she will expand their operation and assume that water will always be available. The conditions may prove to be unenforceable in periods of low flow, because the user can argue that he or she will suffer economic loss if forced to comply. Washington law has, since 1949, allowed a fully appropriated stream to be closed to further appropriation. Therefore, the Washington Departments of Game and Fisheries believe they are better able to protect instream flows for fish and wildlife by recommending denial of the permit. The WDOE agrees that some streams, especially smaller ones that support a significant fisheries resource, need to be closed to further consumptive appropriation. Although instream flow conditions present a more difficult monitoring and enforcement problem, issuing new rights with instream flow conditions allows greater use of the State's waters for the benefit of the people of the State, as required by the Water Resources Act (Slattery 1984).

Sources in the Departments of Game and Fisheries agree that, although their evaluations are built into the process of reviewing discretionary permits, the WDOE is not always responsive or willing to follow their recommendations (Beecher 1984; Zillges 1984). The WDOE, which must consider a broader range of water uses (Ch. 90.54 RCW), believes that WDG and WDF

recommendations are often unnecessarily conservative (e.g., higher flows or denial recommended when it is not necessary) and too heavily weighted toward the single purpose of fish habitat enhancement (Washington Department of Ecology 1983). All three agencies agree that the system works and that negotiation and compromise are part of it.

One constraint on this opportunity is its case-by-case nature. New applications continually are made, even when the stream involved has long been closed to further appropriation. Although the WDOE informs applicants of the status of the stream and encourages them to withdraw their applications in this situation, an application must be processed if the applicant insists. Such an application most likely would be denied by the WDOE (Slattery 1984). Another constraint is the difficulty of enforcement. The WDOE lacks personnel to patrol and report on each of these streams. Enforcement of the permit system is dependent, in large part, on information provided by other holders of water rights in the area and State field personnel. The Departments of Game and Fisheries are unlikely to have personnel available to check on permit compliance because this task is not part of their statutory duty. Despite these constraints, this process provides an on-going opportunity for fish and wildlife interests to protect instream values.

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## ADJUDICATIONS OF WATER RIGHTS

### OPPORTUNITY

The 1917 Water Code (Ch. 90.03 RCW) passed by the Washington State Legislature provided specific procedures for the general adjudication of surface water rights. The adjudication of water rights is a judicial determination of the nature and extent of existing water rights in a specific area.

An adjudication proceeding is initiated by the WDOE through the filing of a "quiet" title action in the appropriate county superior court against all parties claiming water rights. Each right or claim of right, along with any supporting evidence, is reviewed by the superior court after an evidentiary trial conducted by a WDOE-appointed Referee. A determination is made as to the validity, priority, and quantity of the claim. Those parties whose rights are confirmed at the adjudication proceeding are issued a certificate of adjudicated water right (Washington Department of Ecology 1983).

### BACKGROUND

Fifty-six adjudications were completed between 1917 (enactment of the Water Code) and 1940. Sixteen adjudications have been completed since 1940. When drought conditions created Statewide concern about water availability in 1977, the WDOE received several petitions for adjudication from water users on streams where shortages occurred. The Legislature revitalized the adjudication program through increased funding and staffing. However, redirections in budget and staff have delayed the completion of adjudications in the past 2 years (Washington Department of Ecology 1983).

#### Example

Ten adjudications were initiated between 1979 and 1984 (Smith 1984).

- (1) Antoine Creek and tributaries (Chelan and Okanogan Counties);
- (2) Chumstick Creek and tributaries (Chelan County);
- (3) Cow Creek, Sprague Lake, and tributaries (Adams, Lincoln, Spokane, and Whitman Counties);
- (4) Deadman Creek and tributaries (Spokane County);
- (5) Little Klickitat River and tributaries (Klickitat County);

- (6) Nahahum Canyon and tributaries (Chelan County);
- (7) Wolf Creek and tributaries (Okanogan County);
- (8) Yakima River and tributaries (Benton, Kittitas, Klickitat, and Yakima Counties) (Washington Department of Ecology 1983).
- (9) Marshall Lake/Marshall Creek and tributaries (Pend Oreille County); and
- (10) Duck Lake (Okanogan County).

In the Yakima adjudication, the United States filed a claim on behalf of the Yakima Indian Nation. The claim includes water for instream flows to rebuild and maintain salmon and steelhead populations related to the Tribe's treaty-secured fishery. This adjudication has been significantly delayed due to extensions of the filing period for Statements of Claim and continued litigation.

A 1981 Federal Court order, sought by the Yakima Indian Nation, directed the U.S. Bureau of Reclamation (USBR) to release water from reservoir storage during the fall and winter to protect salmon nests from desiccation. This order is under appeal, but has been followed by the USBR since it was filed. Attempts to identify water for instream uses are being made through the Yakima River Basin Water Enhancement Project (YRBWEP). There are five reservoirs associated with this river; the surrounding area is intensively developed for agricultural use. The reservoirs help provide water during short-term critical flow periods in some stream reaches in below average water years (Bucknell 1984; Slattery 1984).

## EVALUATION

The general adjudication of water rights is by far the best way to determine a valid list of water rights in a given area (Slattery 1984). However, the procedure for establishing minimum flows is not part of the adjudication process. If, during an adjudication procedure, a right to be confirmed is based on a right that has been previously conditioned with a minimum flow, that conditioning carries over into the confirmed right under the adjudication process. Instream flows often are set without complete knowledge of the water rights (Smith 1984). Some persons believe that a determination of water rights should be made prior to setting any instream flows, but the time and expense of such an action may be prohibitive.

The WDOE is streamlining procedures and continues to work on proposals designed to reduce the amount of time involved in adjudication proceedings (Washington Department of Ecology 1983). It is not known if the adjudication process will contribute to the State's ability to determine instream flow needs and set required flows.

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## RELINQUISHMENT OF WATER RIGHTS

### OPPORTUNITY

Water rights abandoned or forfeited by nonuse for any period of 5 consecutive years are considered relinquished under RCW 90.14.130 - .210 and revert to the State. Relinquished water rights may become available for appropriation for other beneficial uses through the State permit system. Relinquished water rights for instream flows also may be available through adoption by regulation. The legal basis for the forfeiture of a right because of nonuse is the Relinquishment Statute (Ch. 90.14 RCW). The relinquished right is removed from the ranking list of water rights. Junior rights, including any adopted instream flows, thus have an improved likelihood of water availability (Slattery 1984).

### BACKGROUND

The 1981 Washington State Legislature repealed a 1979 State Water Code amendment that allocated relinquished water right quantities to meet a minimum flow level established by the WDOE. The relinquished water would have retained the original date of priority of the reverted right when applied to the minimum flow.

The 1979 amendment would have allowed a minimum flow to gain priority over previously existing water rights as relinquishments occurred over time. This could have provided a means to improve streamflows in streams that currently were fully allocated to offstream uses.

The 1981 repeal reestablished the prior law, making relinquished water available under the permit system. All existing rights are satisfied in order of priority and/or may be available for reappropriation by the WDOE for any beneficial use, including instream flows. Such an action might provide water for instream uses but the priority date of the relinquished rights may be unfavorable (Slattery 1984).

The parties involved in a relinquishment of water rights under RCW 90.14 procedures (which formally record relinquishments so that water becomes available for reappropriation) would be the Department of Ecology and the party who has obtained, but who does not use, the rights. Other parties might be involved in an advisory capacity. For example, the Department of Game, the Department of Fisheries, environmental groups, or individuals who are aware of a potential relinquishment might refer the information to the Department of Ecology for action. Essential to the use of this opportunity is knowledge of



water rights records and the ability to field check water use. These actions, together with the required legal expertise, could incur considerable cost. Unused water rights frequently are identified in general adjudication proceedings. In order for relinquished water to be used to help satisfy instream flow needs, biologists need to set instream flows according to the procedures discussed in this report. Instream flows established by regulation constitute an appropriation with a priority date corresponding to the effective date of the regulation (RCW 90.03.345).

#### EXAMPLE

No examples of relinquished water rights that have been appropriated for instream use are available. The WDOE normally pursues relinquishment only when such actions are incidental to other water right activities (Washington Department of Ecology 1983).

#### EVALUATION

The chief impediment to the application of this procedure seems to be the lack of personnel to check records and patrol streams to determine how rights are being used. Because of the staffing limitations, the WDOE has not actively sought water rights to relinquish under Ch. 90.14 RCW (Slattery 1984). Some rights have been relinquished voluntarily. The WDOE's policy is to relinquish unused water rights as they are identified through other activities. The State Department of Game would like to have more opportunity to use relinquishment and reappropriation (Beecher 1984).

Although it is a time-consuming process, the WDOE regards it as a potential tool for the replacement of stream habitat that might otherwise be lost when new dam sites are developed. Therefore, this opportunity has potential as a tool to protect existing values of water (Beecher 1984).

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## PURCHASE AND LEASE OF WATER RIGHTS

### OPPORTUNITY

Contractual arrangements to appropriate instream flows include direct purchase and leasing of water. The legal basis of this opportunity lies in the provisions of RCW 77.12.200, which explicitly empower the Washington Department of Game to acquire property, including water rights. It appears that this opportunity also is available to the Washington Department of Fisheries. RCW 75.20.110 provides for the purchase and lease of water rights on portions of the Columbia River and its tributaries; RCW 75.08.040 empowers the Department of Fisheries to purchase property rights, which can be construed as extending to the purchase and lease of reservoir storage rights.

### BACKGROUND

Instream flow rights could be purchased by a private party, by the Washington Department of Game, or by the Washington Department of Fisheries. The Departments of Fisheries and Game are unlikely to purchase land [although the WDG purchases or obtains land to manage as wildlife habitat (Beecher 1984)]; they also are unlikely to acquire water rights in this manner. Purchase of water rights, separate from land, is possible under Washington law if there is a diversion, such as a dam. Whether or not such a purchase for instream use could be legally protected is still a question under Washington law. It is likely that junior rights holders would appropriate the water and argue that, on an equity basis, the instream flow rights should be allocated to them. For this reason, the Departments of Fisheries and Game have no current programs to purchase water rights (Beecher 1984).

The Departments of Fisheries and Game also can lease water but have no program to do so. Leasing water provides only an interim solution but can be applied to protect a valuable fishery in a particular stream where no permanent supply of flows is available for purchase.

The major cost of implementing this opportunity is the price of water rights, which has risen dramatically in the last few years and probably will continue to rise. Other costs include personnel and funds for studies to identify streams where a purchase would have the greatest benefit and the substantial negotiation required for the purchase.

### EXAMPLE

Purchase and lease has not been used to date in Washington.

## EVALUATION

Contractual arrangements for the enhancement of instream flows have not been used in Washington in the past, and sources from the Departments of Game and Ecology are pessimistic about future application of the strategy. Department of Fisheries personnel, however, believe that this may be a promising opportunity for overappropriated streams and that it merits further consideration (Zillges 1984). Cost is seen as the major constraint, although the acquisition cost can be reduced if the water is resold downstream. The other major argument against the use of this opportunity is the existence of Washington's instream flow laws, Ch. 90.22 RCW and Ch. 90.54 RCW. The legislature already has provided a mechanism for obtaining instream flows for fisheries and wildlife; therefore, these agencies should not try to obtain instream flows in other ways. Officials in the Departments of Game and Ecology believe that obtaining base flows under Ch. 90.54 RCW results in better resource management (Beecher 1984; Slattery 1984).

The Departments of Fisheries and Game are authorized to lease water for instream use when no flow rights are available for sale. Leasing arrangements incur the following constraints, in addition:

- (1) Leasing presents only an interim solution; and
- (2) Leases may be subject to conditions that are expedient for the vested claimant, rather than for the leaseholder.

Despite the constraints, the opportunity of employing contractual arrangements to enhance instream flows might be investigated for application in Washington. It provides a direct way to legally protect instream flows. It also provides an opportunity to acquire senior water rights, an increasingly important factor in a State where many streams are fully or overly appropriated (Nelson et al. 1978).

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## STREAM CLOSURES

### OPPORTUNITY

Washington law provides three mechanisms for closing streams to further appropriation on a temporary or permanent basis. The first and oldest method is the refusal, by the Department of Ecology (who administers water rights), to grant a permit where the issuance of the permit would result in lowering the flow below that necessary to adequately support fish populations. The legal basis for this procedure is RCW 75.20.050, passed in 1949. (This procedure is discussed in detail on p. 60). The WDOE examines these four pieces of information when considering a denial:

- (1) The lack of available water;
- (2) The effect of denial on existing rights;
- (3) The results of the proposed use on public interest; and
- (4) An inability to determine the beneficial use. (RCW 90.03.290)

A reduction in the stream flow below an acceptable level as a result of the diversion could be a sufficient reason to deny the application (Slattery 1984).

The second method is the permanent closure, by regulation, of a stream for further consumptive appropriation under a basin management plan or Instream Resource Protection Program (IRPP) (see p. 60). The third method is the withdrawal of a stream from further appropriation until necessary studies have been made and a comprehensive basin management plan formulated by the Department of Ecology. The last two methods are authorized by the 1971 Water Resources Act (Ch. 90.54 RCW).

The WDOE is under a mandate to formulate plans for all State river basins and is proceeding to do so. Appropriation is frozen while the Department of Ecology formulates a comprehensive plan when the temporary withdrawal procedures are invoked. When these procedures are not invoked, appropriation of water can continue during the planning process.

### BACKGROUND

This opportunity was developed because of problems discovered during the routine administration of Washington's water policy. A permit denial under

RCW 75.20.050, for example, would occur only after the following routine steps had been taken: (1) application to the Department of Ecology for a permit; (2) routine referral of the application to the Departments of Game and Fisheries for their recommendations; (3) determination, by the Departments of Game and Fisheries, that the appropriation would be detrimental to fish life; and (4) recommendation of denial (see pp. 60-63). Closure under a basin management plan or IRPP formulated by the Department of Ecology would occur only after all the administrative steps necessary to formulate and adopt the plan had been taken. Withdrawal under Ch. 90.54 RCW procedures might occur when minimum flows were not established and there was a conflict over water use. The WDOE might institute a moratorium on appropriation until information could be gathered and priorities and needs settled.

Situations where a temporary moratorium (withdrawal) is likely to be invoked are those in which, in the absence of a basin management plan, water users and other interested parties believe that the quantity or quality of water available to them will diminish before an equitable plan can be formulated. Parties involved would be water users, citizen groups, environmental groups, the Department of Game, the Department of Fisheries, and the Department of Ecology. The WDOE may informally withhold action on applications during program development (Bucknell 1984; Slattery 1984).

Implementation of this opportunity is relatively simple in the case of an RCW 75.20.050 action. The appropriate resource department, after checking its files and perhaps making some field observations, makes its recommendations. The process is part of an institutional routine, and the costs, apart from staff and record-keeping, are minimal. However, denials are frequently appealed, creating a considerable workload for WDOE regional staff.

Withdrawal under Ch. 90.54 RCW is linked to the eventual formulation of a basin management plan, IRPP, or general adjudication, which may result in a closure. It is a stop-gap measure and occurs, if at all, before the formulation of a plan or other action. A withdrawal might be established by the Department of Ecology at the request of the Department of Game or the Department of Fisheries or on its own volition. Parties who are concerned about the possibility of irreparable loss of the water resource while a plan is pending can protest a permit application or challenge the WDOE's report of findings to the Pollution Control Hearings Board. By adopting the necessary regulations to withdraw the stream from appropriation for a specified period or until a plan is formulated, the Department of Ecology and the protesting parties have time to conduct additional research. Applications for water permits are held during the withdrawal period, pending completion of the plan. These applications are processed in accordance with the policies established by the plan once it has been adopted.

Implementing a closure under RCW 90.54 normally involves the development of administrative rules as part of a basin management or Instream Resources Protection Plan. This process consists of the following steps. First, the Department of Ecology generates public input by means of citizen advisory groups, public workshops, and/or questionnaires. At the same time, the Department conducts a technical evaluation, consisting of field surveys of water use, research of water records, determination of minimum stream flows

(see pp. 60-63), and interagency consultation with both State and Federal agencies. Public input and the technical evaluation result in a draft report of proposed regulations, which is reviewed, evaluated by the public and other agencies, and revised. The proposed regulations are reviewed by citizens and interested agencies again at public hearings, and the plan is adopted as per the administrative procedure of RCW 34.04.

#### EXAMPLE

Special temporary withdrawal regulations were adopted in the Little Spokane River Basin Management Plan, completed in December, 1975. They expired with the adoption of the plan, but illustrate the potential effectiveness of this opportunity.

The Little Spokane River is a nonnavigable stream, with headwaters in three eastern Washington counties. Its main stream flows in a southerly direction to a point 10 miles north of the City of Spokane, then flows westerly to the Spokane River. Land uses along the lower reaches were formerly agricultural. The current use of the land is for suburban development. Conflicts among water users developed in the basin over the years until, in 1972, a group of basin residents appealed a commercial irrigation permit (granted by the Department of Ecology) to the State Pollution Control Hearings Board. The Board concluded that the character of water use in the basin was changing from agriculture and irrigation uses to aesthetic and recreational uses. It also found that both flow and water quality had deteriorated and that it was the responsibility of the Department of Ecology to regulate the situation.

The case ultimately was remanded to the Department of Ecology by the State Supreme Court. The Department withdrew the public waters of the Little Spokane from appropriation until June 30, 1976, or until a water management program had been developed, whichever occurred first.

The Department followed established administrative procedures to secure public involvement and sought recommendations from State resource agencies. Public input and technical evaluations established that the public wanted to protect instream flows and to maintain a rural agricultural environment and that water was available for future appropriation only along the mainstem of the Little Spokane. The management program adopted by the Department protects valid water rights in existence at the time the program was adopted; sets base flows equivalent to those available 80% of the time under naturally fluctuating conditions; makes all water rights granted subsequent to the adoption of the program subordinate to the established base flows; retains lakes in their natural condition by limiting appropriations to domestic, stock, and non-consumptive uses; and limits future appropriations to the mainstem of the Little Spokane. This program ultimately was codified as Chapter 173-555 of the Washington Administrative Code (WAC).

The Little Spokane program determined the quantity of water available for future consumptive appropriation after existing rights and base flows are satisfied. When the remaining water is fully appropriated, no more rights will be issued and the stream will be closed.



The citizen group that initiated this opportunity made the decision to take their protest to the State administrative and judicial forums and to pay the related costs. The other costs were paid for by the Department of Ecology and the other State agencies that contributed to the Water Resources Management Program.

## EVALUATION

The Little Spokane case illustrates that this opportunity has existed in the past, both in terms of obtaining a withdrawal from appropriation pending appropriate administrative action and closing a stream to future appropriation when its waters are fully allocated to instream and off-stream uses. The costs to the State of Washington in this process are high; a major State effort is required to create and apply the general water policy, as illustrated by the Little Spokane plan. The cost may be justifiable, however, in that the opportunity does provide a relatively efficient way to stop overappropriation and prevent the total dewatering of the State's streams.

Depending on the situation, the WDOE may:

- (1) Exempt noncommercial stock watering;
- (2) Exempt in-house, single domestic supply;
- (3) Exempt single domestic supply (including outside amenities up to 0.5 acre per residence for lawn and garden irrigation);
- (4) Allow these exemptions only if no alternative source of supply is available; or
- (5) Deny exempted uses if the cumulative impact of numerous diversions would significantly impact instream values (Slattery 1984).

Existing rights are not affected by either a withdrawal or a closure. Administrative constraints do exist, however. First, the time needed to formulate a comprehensive plan is 2 years. Second, formulation of a plan requires a significant commitment of State resources. Third, a withdrawal is only a stop-gap solution. Fourth, enforcement of the Management Plan is difficult because enforcement staff are in short supply. Fifth, instream flows adopted under a Management Plan may prove insufficient. And last, plans may be revised and instream flows modified as conditions change.

Despite these constraints, the Department of Ecology, the Department of Game, and the Department of Fisheries state that this process is used with frequency and effectiveness (Beecher 1984; Slattery 1984; Zillges 1984).

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## CONDEMNATION OF WATER RIGHTS

### OPPORTUNITY

The power to condemn, or the power of eminent domain, is the right of any government entity to take private property for a public purpose. The condemnation of existing water rights extends beyond the power to condemn for public water supply in Washington. Any person may condemn an inferior use of water for a superior use (RCW 90.03.040). However, the applicable statute does not designate priorities among the uses; that is left to the Court. The statutory right to condemn is limited in that a right cannot be condemned for irrigation purposes if the owner of the right would be deprived of the right to the quantity of water reasonably necessary to irrigate land he or she has already put into production. The Departments of Fisheries and Game are specifically authorized to acquire water rights by condemnation to protect the Columbia River Fish Sanctuary (RCW 75.20.110). The chief legal basis of condemnation is the condemnation provision of the Water Code (RCW 90.03.040).

### BACKGROUND

Parties involved in a condemnation might include the Department of Game, the Department of Fisheries, and the Department of Ecology. The process requires filing a condemnation proceeding in the appropriate Superior Court and convincing the Superior Court Judge to, in effect, judicially force the sale of a condemned right (Nelson et al. 1978).

The State legislature, through the Water Resources Act of 1971 (RCW 90.54.020), has placed a high priority on fish and wildlife as a beneficial use. Therefore, a person or agency bringing a condemnation action should be able to use the condemnation procedure. However, the question of "highest use" is left up to the discretion of the Court. The party bringing the action has to convince the Superior Court Judge that the relative benefits of the use of the water for fish and wildlife outweigh the benefits of the current use (Nelson et al. 1978).

### EXAMPLE

There is legal precedent in Washington for using the power of eminent domain to condemn irrigation rights by a local Water District for a community water supply. This precedent resulted in the purchase of both land and water rights through the condemnation procedure. However, this opportunity has not been used by State resource agencies to reserve instream flows (Nelson et al. 1978).

## EVALUATION

According to sources in the Department of Game and the Department of Ecology, other opportunities for reserving instream flows are preferred over condemnation because condemnation is an inefficient and costly method (Beecher 1984; Slattery 1984).

The chief obstacle to a successful condemnation proceeding is proving that a fish and wildlife use is a higher use of the water than the current use. Proving that the less tangible ecological, scenic, recreational values associated with fish and wildlife outweigh other uses may be difficult if the existing beneficial use, such as irrigation, has an obvious and measurable economic value.

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PART IV: THE PUBLIC TRUST DOCTRINE

## THE PUBLIC TRUST DOCTRINE

by  
P. S. Wassenburg

### OPPORTUNITY

Each State owns certain property, which it holds in trust for the general public. A State holds this property not as a proprietor, free to sell or exchange at will, but as a government, which must consider the welfare of the entire public before taking any action involving public trust property. This obligation is called the public trust doctrine. Under this doctrine, the State government must act as a trustee for the interests of the general public. The Courts have the authority to determine whether or not the State is fulfilling its obligations as trustee.

### BACKGROUND

The public trust doctrine applies to natural resources such as land, water, or wildlife, that are held by the government for the benefit of the general public. The public has a right to have these resources preserved for their use and enjoyment. The public trust doctrine provides a means to protect that public interest. The doctrine permits a Court to supervise the dealing of State governments with regard to public trust property. Thus, the sale or grant of trust property to a private party can be examined carefully by the courts. If the Court finds that a State has not acted in the public interest, the sale or grant can be invalidated.

The application of the public trust doctrine to water and water-related resources rests on the distinction between navigable and nonnavigable waters. All navigable waterways are public; nonnavigable waters are private. If a watercourse is navigable, the public trust doctrine can be applied to any State decision regarding the right to use the waterway because the public owns all navigable waters. The State may grant private individuals the right to use water from a navigable waterway; that right is called a usufructory right. However, the owner of a usufructory right cannot use that right in any way that is detrimental to the public interest in the trust property.

Two definitions of navigability must be taken into consideration in every State. The first is the Federal definition. According to the U.S. Supreme Court, the United States Constitution gives Congress the authority to protect public rights to navigable waterways under the Commerce Clause because navigation is part of commerce [The Daniel Ball, 77 U.S. 557 (1871)]. The Federal definition of navigability is referred to as the navigable-in-fact test. A navigable waterway, in its natural or improved condition, is usable by

customary modes of travel on water [U.S. v. Appalachian Power Co., 311 U.S. 377 (1940)]. Federal authority extends to any watercourse that fits this definition.

When the Federal government does not choose to use its authority over navigable waters, State governments possess the legal power to protect the public rights to those waters. The extent of that State power depends on the definition of navigability used by the State. Some States use the Federal, navigable-in-fact, definition. Other States have their own, broader definition. For example, Idaho defines navigability as:

. . .any stream which, in its natural state, during normal high water will float cut timber having a diameter in excess of six (6) inches or any other commercial or floatable commodity or is capable of being navigated by oar or motor propelled small craft for pleasure or commercial purposes. . . [Idaho Code § 36-1601(a)].

States have a duty to exercise authority over all public (navigable) waters within their boundaries. That authority cannot be surrendered, alienated, or delegated to a private entity [Illinois Central Railroad Company v. Illinois, 145 U.S. 387 (1892)]. However, the State Legislature can delegate that authority to a State administrative agency. The State authority over navigable waters provides the basis for the assertion of the public trust doctrine. The broader the State's definition of navigability, the greater the potential impact of the public trust doctrine in the management of water resources within that State.

The United States Supreme Court case of Illinois Central Railroad Company v. Illinois [145 U.S. 387(1892)] is a leading case on the public trust doctrine. In 1869, the Illinois State Legislature granted the Illinois Central Railroad a 1 mi<sup>2</sup> tract of submerged lands under Lake Michigan along the central business district of Chicago. In 1873, the Legislature repealed the grant and went to Court to get the repeal enforced.

When the case reached the Supreme Court, it held the grant invalid under the public trust doctrine. The Court found that the Legislature had no authority to give away the lake bed:

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce. . . [Illinois Central Railroad Company v. Illinois, 145 U.S. 435 (1892)].

The Court described the nature of the title the States hold to public trust lands:

But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference from private parties [Illinois Central Railroad Company v. Illinois, 145 U.S. 452(1892)].

The Supreme Court upheld the State's claims and wrote one of the few opinions in which direct conveyance of trust lands has been held to be beyond the power of a State Legislature. The Court did not actually prohibit the disposition of trust lands to private entities; its holding was much more limited. A State may not divest itself of the authority to govern an area for which it has the obligation of acting as a trustee to protect public interests. Granting almost the entire waterfront of a major city to a private company was, according to the Court, an abdication of State responsibility to ensure the public interest in navigation.

Although the U.S. Supreme Court recognized the existence of the public trust doctrine in 1892, there still is relatively little State or Federal case law on the subject. This is a disadvantage for groups interested in using the doctrine because they have no readily accessible body of case law to cite in support of their claims. However, the scarcity of precedent also is an advantage in that creative uses of the doctrine to protect water and water-related resources are not precluded by previous cases.

Sometimes, when a State Supreme Court has no precedent of its own, it will "borrow" or adopt precedent from another State. Although California is not one of the States discussed in this report, it is useful to examine a recent California State Supreme Court case on the application of the public trust doctrine to water resources. The case is National Audubon Society v. Superior Court of Alpine County [658 p. 2d 709 (Cal., 1983)], sometimes referred to as the "Mono Lake case." The California State Water Resources Control Board awarded a water right to the Los Angeles Department of Water and Power (DWP) in 1940 to divert nearly the entire inflow of Mono Lake. The National Audubon Society filed suit in 1979 to stop the diversion. They argued that continued diversion from the tributaries of the lake would result in the lake becoming unable to support the large population of brine shrimp and the colony of California gulls that fed on the shrimp and lower the level of the lake enough to impair recreational use.

The Court was dealing with the conflict between traditional appropriative rights law and the public trust doctrine. The Court held that the DWP did not have the right to continue to divert water from the lake tributaries without regard to the impact of the diversion on the public trust resources connected with the lake. Two passages from the opinion summarize the Court's reasoning:

The core of the public trust doctrine is the state's authority as sovereign to exercise continuous supervision and control over the navigable waters of the state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake and bars DWP or any other party from claiming a vested right to divert waters



once it becomes clear that such diversions harm the interests protected by the public trust ... The state must have the power to grant nonvested usufructory rights to appropriate water even if diversions harm public trust uses. Approval of such diversion without considering public trust values, however, may result in needless destruction to those values. Accordingly, we believe that before state courts and agencies approve water diversions, they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests. [National Audubon Society v. Superior Court of Alpine County, 658 Cal. 712(1983)].

The California Supreme Court set up a balancing requirement: State agencies and Courts must balance the competing interests of appropriators and the public trust when making water allocation decisions. The public interest recognized by the Court in this case was the right to the preservation of the "scenic beauty and ecologic values" of the lake [National Audubon Society v. Superior Court of Alpine County, 658 Cal. 711(1983)]. The Mono Lake case recently was cited by the Idaho Supreme Court in the case discussed below.

#### IDAHO

Idaho defines navigability much more broadly than States using the navigability-in-fact test. The potential range of State authority over waterways in Idaho is, therefore, quite broad. The Idaho State Supreme Court has discussed the public trust doctrine in two recent cases. In a 1979 case, State Ex Rel. Haman v. Fox (594 p. 2d 1093), the Court examined an action brought to establish public rights to privately-owned waterfront property on Lake Coeur d'Alene. The owners of the private property had erected a sea wall that cut off access to beach front property to which the owners had previously allowed some public access. It was argued that the sea wall interfered with the public trust in which lake waters, and access to lake waters, are held.

The Court found that there was no public right to use the property in question. Prescriptive rights, according to the Court, cannot be obtained by the general public without specific statutory authorization [State Ex Rel. Haman v. Fox 594 p. 2d (1098)]. The Court refused to adopt the broad California rule regarding implied dedication of private property to public use. They ruled that "a party claiming a right by dedication bears the burden of proof on every material issue. The intent of the owner to dedicate his land to public use must be clearly and unequivocally shown and must never be presumed". [State Ex Rel. Haman v. Fox 594 p. 2d(1100)]. The Court decided that the case did not present an appropriate opportunity to use the public trust doctrine because there was no publicly-owned natural resource involved, just land that was clearly private property [State Ex Rel. Haman v. Fox 594 p. 2d (1101-1102)].

In 1983, the Court found an appropriate case in which to apply the public trust doctrine: Kootenai Environmental Alliance v. Panhandle Yacht Club, Inc. (671 p. 2d 1085). The Idaho Department of Lands granted a lease to the Panhandle Yacht Club that allowed the club to construct private docking facilities on a bay of Lake Coeur d'Alene, a navigable lake. The Kootenai Environmental Alliance challenged the grant, arguing that it violated the public trust doctrine.

The Court developed a two-party test to determine whether or not a grant of public trust lands is valid. The grant is considered valid if it "is in aid of navigation, commerce or other trust purpose" and if it does not "substantially impair the public interest in the lands and waters remaining" [State Ex Rel. Hamann v. Fox 594 p. 2d (1089)].

After reviewing public trust doctrine cases in Massachusetts, Wisconsin, and California (including the Mono Lake case discussed above), the Court addressed the issue of whether or not public trust lands could be alienated (i.e., granted to private entities):

Public trust resources may only be alienated or impaired through open and visible actions, where the public is in fact informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made thereon. Moreover, decisions made by non-elected agencies rather than by the legislature itself will be subjected to closer scrutiny than will legislative decisionmaking [State Ex Rel. Hamann v. Fox 594 p.2d (1091)].

The Court held that the Courts would examine the alienation of public trust resources carefully. This examination would include the consideration of at least four factors: (1) the degree of effect on public trust uses; (2) the impact of the individual project and its cumulative impact with other existing similar impediments; (3) the impact of the project on the primary purpose of the public trust resource; and (4) the degree to which the private use would interfere with broader public uses [State Ex Rel. Hamann v. Fox 594 p. 2d (1092)].

Although the Court upheld the grant in question, it cited the Mono Lake decision and adopted the rule of that case: "The State is not precluded from determining in the future that this conveyance is no longer compatible with the public trust imposed on this conveyance" [State Ex Rel. Haman v. Fox 594 p. 2d (1094)].

The Kootenai Environmental Alliance decision, combined with Idaho's broad definition of navigability, should provide a strong base for the use of the public trust doctrine to protect water and water-related resources in Idaho. However, the Haman decision must be kept in mind; the Idaho State Supreme Court appears to be willing to apply the public trust doctrine to State resources but does not acknowledge all claims that a resource falls under the public trust umbrella. The extent to which the Court will apply the public trust doctrine to limit the use of private property held in fee simple is uncertain.

## OREGON

Oregon uses the Federal navigable-in-fact definition of navigable waterways [Luscher v. Reynolds, 56 p. 2d 1148 (1936)]. The State's authority over navigable waterways includes the authority to protect the public trust in fishing, recreation, and navigation uses.

The Oregon State Courts historically have been much more willing than the Idaho State Courts to use the public trust doctrine to protect water and water-related resources. For example, in State Ex. Rel. Thornton v. Hay [462 p. 2d 671 (1969)], the Oregon Supreme Court recognized customary public rights to use tideland beach property for recreational uses and required that private property owners abutting tideland beaches provide public access to those lands. Justice Deneke, in a concurring opinion, argued for broad recognition of the State authority to protect the public trust as the basis for easements on private property adjacent to navigable waterways [State Ex. Rel. Thornton v. Hay 462 p. 2d 671 (1969)].

The Oregon Court of Appeals recently has appeared more willing than the Oregon Supreme Court to extend the application of the public trust doctrine. In the case of Morse v. Oregon Division of State Lands [581 p. 2d 520 (1978)], the Court of Appeals faced the question of whether or not the State could allow the filling of estuarine land for the nonwater-related purpose of constructing an airport runway. The Court held that the public trust doctrine prevented such activities:

Historically, lands underlying navigable water have been recognized as unique and limited resources and have been accorded special protection to insure their navigation, fishery, and recreation. Under the common law public trust doctrine, the public use of such waters could not be substantially modified except for water-related purposes [Morse v. Oregon Division of State Lands 581 p. 2d 524 (1978)].

The application of the public trust doctrine by the Court of Appeals later was overruled by the State Supreme Court, although the State Supreme Court found other grounds on which to deny the State authority to fill the estuary [Morse v. Oregon Division of State Lands, 590 p. 2d 709 (1979)]. The State Supreme Court ruled that the public trust doctrine does not apply to this case because the case involved a conflict between two public rights rather than a conflict between the public interest and rights of private property holders [Morse v. Oregon Division of State Lands 590 p. 2d 709 (1979)].

More recently, the Oregon Court of Appeals held that they will not consider the application of the public trust doctrine if the Legislature has specifically addressed the rights to certain property in a statute [Oregon Shores v. Oregon Fish and Wildlife, 662 p. 2d 356, 364 (1983)].

In summary, Oregon State Courts have been willing to use the public trust doctrine to limit the use of private property associated with navigable water. However, in recent years, the opinions indicate that the Courts are not willing to extend the applicability of the doctrine beyond certain limits.

#### WASHINGTON

Washington also employs the Federal navigable-in-fact test of navigability [Kemp v. Putnam, 288 p. 2d 839 (1955)]. As of the summer of 1984, there were no State Court cases in Washington addressing directly the application of the public trust doctrine to water or water-related resources. The broad regulatory powers given the Washington Department of Ecology (DOE) may partially explain why there has been little attention to the public trust doctrine in this State. The DOE has primary responsibility for the establishment and protection of instream flows (RCW §§ 90.22, 90.54) and general authority over the management of the waters of the State in the public interest (RCW § 90.03). The Washington State Supreme Court has held that the State Courts will not reverse a DOE interpretation of its mandate to act in the public interest unless there is a clear showing that the DOE <sup>has abused</sup> its discretion [Schuh v. State Department of Ecology, 667 p. 2d 64 (1983)].

Three cases should be noted, however, because they have potential relevance to future applications of the public trust doctrine in Washington. Washington is one of three western States that had, at one time, a dual system of water law with one system for appropriative and riparian rights; the other two States were at one time recognized by Oregon. Owners of lands bordering on navigable waterways in Washington have never had riparian rights to the use of those waters [Hill v. Newell, 149 p. 951 (1915)]. This fact could be important in future applications of the public trust doctrine because it limits the number of potential preexisting private rights with which the public trust rights would have to compete.

The second potentially applicable case involves the State of Washington's responsibility as a riparian landowner on nonnavigable waters. In the case of Botton v. State of Washington [420 p. 2d 352 (1966)], the State Supreme Court dealt with the question of whether or not the opening of a public access to a lake by the State constituted a taking of the rights of other riparian landowners. The Court held that the State, as a riparian landowner, could permit the use of the lake to conflict with the rights of other riparian landowners and that those riparian landowners could not prevent the State from using its lands as a public access to the lake. The Court ordered the State to regulate public access in a way that would ensure that the rights of the other landowners were not harmed. This case could affect future applications of the public trust doctrine because it indicated that the Court is willing to recognize public rights to the use and enjoyment of waterways. However, it also indicated that these public rights would be balanced with existing private rights in an attempt to accommodate both to some extent.

The final case, Wilbour v. Gallagher [462 p. 2d 232 (1969)], involved the question of public access to a navigable waterway. The waters of the lake in question are raised and lowered artificially. Riparian landowners argued that the public should not have access to the parts of the lake that were submerged only when the lake waters were at a high point. The owners argued that they held title to the land all the way to the low water mark of the lake and that they had the right to restrict access to the water that periodically submerged those lands. The Court disagreed with the riparian landowners:

The logically resulting rule for the protection of the public interest is that, where the waters of a navigable body are periodically raised and lowered by artificial means, the artificial fluctuation should be considered the same as a natural fluctuation. . .the public has the right to go where the navigable waters go, even though the navigable waters lie over privately owned lands [Wilbour v. Gallagher 462 p. 2d 238(1969)].

Even though the Court did not mention the public trust doctrine, the emphasis on the public interest in access to navigable waters, even when such access interferes with private property interest, seems very similar to the public trust doctrine (Johnson 1980).

#### CONCLUSION

The possibility of developing the public trust doctrine as a water resource management tool still exists in all three States. Development of this tool could be assisted by encouraging State Courts to consider the use of the doctrine by other States, as the Idaho Supreme Court did when it relied on the California Mono Lake decision.

According to existing case law, a State has the duty to exercise authority over the public waters within its boundaries. Three types of restrictions on this authority can be derived from the public trust doctrine: (1) property subject to the trust must be made available for recognized uses by the general public; (2) the property may not be sold, even for a fair cash equivalent; and (3) the property must be maintained for particular uses. The resource must be held available for specific traditional uses (e.g., navigation, fishing, or recreation) or for uses related to the natural use peculiar to that resource (Sax 1970).

The public trust doctrine provides a potential tool for protecting instream water uses. A comprehensive summary of the ways in which this can be done is presented in Johnson (1980). Johnson argues that the public trust doctrine can be used in litigation to stop overappropriation and misappropriation of navigable waters. He lists eight ways in which the doctrine has been used successfully in the Courts.

- (1) To require express legislative action to protect trust resources [City of Berkeley v. Superior Court of Alameda County, 606 p. 2d 326 (Cal. 1980)];

- (2) To invalidate State legislation that allows the development of resource-related property [Priewe v. Wisconsin State Land and Improvement Co., 67 N.W. 918 (Wisc. 1896)];
- (3) To affirm a State legislative rescission of a grant of trust property [Illinois Central Railroad Co. v. Illinois, Supra.];
- (4) To prohibit delegation of State authority over trust property to private development companies [Gould v. Greylock Reservation Commission, 215 N.E. 2d 114 (Mass. 1966)];
- (5) To require broad-based decisionmaking on the use of trust resources [Meunsch v. Public Service Commission, 55 N.W. 2d 40 (N.D. 1962)];
- (6) To create a public easement over privately-owned land to ensure public rights to navigation, commerce, and recreational uses of waters bordering on the land [Marks v. Whitney, 491 p. 2d 374 (Cal. 1971)];
- (7) To require comprehensive water planning before issuing permits for water use [United Plainsman Association v. North Dakota State Water Conservation Commission, 247 N.W. 2d 457 (N.D. 1976)]; and
- (8) To require all reasonable efforts to minimize the harm caused to trust resources by the use of the property for other public purposes [City of Madison v. State, 83 N.W. 2d 674 (Wisc. 1957)].

Johnson (1980) also suggested that the doctrine could be expanded by tying it to other water resource cases, including riparian rights cases that protect water levels from extraction, navigation servitude cases, and public use cases. He pointed out that recent State legislative and administrative efforts to recognize and protect instream water uses can be cited in public trust doctrine cases as evidence that the public interest in water and water-related resources deserves special consideration by the Courts.

It generally has been assumed that the public trust doctrine extends only to navigable waterways, which could limit the usefulness of the doctrine in a State with a narrow definition of navigability. There are three suggested approaches in attempting to extend the public trust doctrine to waters traditionally considered nonnavigable. Two of the approaches are discussed by Johnson (1980): (1) reliance on riparian rights cases in States with riparian or mixed allocation systems (e.g., Washington and Oregon); and (2) utilization of the public use cases that focus on prescriptive rights and implied dedication.

The third approach derives from two Montana State Supreme Court cases, Montana Coalition for Stream Access, Inc. v. Hildreth [684 p. 2d 1088 (1984)] and Montana Coalition for Stream Access, Inc. v. Curran [682 p. 2d 163 (1984)]. In the Hildreth case, the Court held that the public has a right of access to any stream up to its ordinary high water mark without interference from owners of land through which the stream flows. They based their decision on the

finding that navigability is not a limitation on the public's rights because the Montana State Constitution contains the following provision: "All surface, underground, flood and atmospheric waters within the boundaries of the State are the property of the State for the use of its people..." (Supra., 1091). In the Curran case, the Court held that any surface water capable of use for recreational purposes is open to the public under the public trust doctrine and the State Constitution (Supra.). This approach would be applicable in any State with a similar provision in its State constitution.

The potential breadth of application of the public trust doctrine within a State primarily is up to the discretion of the members of that State's judiciary because the public trust doctrine is common, or judge-made, law. The three cases discussed above illustrate that different Courts have different views of the proper balance between the rights of private property owners and the general public. The only major limitation on the use of the doctrine is the requirement in the U.S. Constitution that private property not be taken without just compensation. State Courts must keep the just compensation requirement in mind when they decide the extent to which the rights of a private property owner are limited by the existence of a public trust in certain resources (Hay v. Bruno, 344 F. Supp.).

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PART V: NORTHWEST POWER PLANNING COUNCIL



## INTRODUCTION

by  
James R. Ruff

### PURPOSE

Development of dams and hydroelectric projects on the Columbia and Snake Rivers has greatly altered the natural flows in the Columbia River drainage. Runoff during the spring is stored in reservoirs for use during periods of naturally low flows. Regulating the river in this fashion increases the stable energy load carrying capability. It also reduces river flows, especially during the spring when juvenile salmon and steelhead are migrating downstream to the ocean. Using the river for reservoir storage has resulted in reduced flows and a greater cross-sectional area, increasing the time required for juveniles to migrate from their origin to the ocean. This increase in travel time affects the ability of the juvenile salmon to make the transition from freshwater to saltwater and results in increased exposure to predatory fish and birds. Juvenile salmon also experience higher water temperatures, different water chemistry, and greater susceptibility to disease as a result of the reduced flows.

The State fish and wildlife agencies and Indian tribes recognize that one source of their difficulties in influencing power system operations in the past has been a lack of expertise and experience in power system planning and operations. They have lacked the necessary funds to hire individuals with the interdisciplinary skills necessary to understand highly technical power system concepts, as well as the biological needs of fish and wildlife. The power system operators acknowledge the need for fish and wildlife agency and tribal representatives who have this type of expertise. The power system operators also stress the need for the fish and wildlife agencies and tribes to coordinate their input to ensure clear and timely integration of fish and wildlife requirements when power system decisions are being made [The Pacific Northwest Electrical Power Planning and Conservation Act of 1980 (16 U.S.C. 839 et seq.; known as the Northwest Power Act)].

The Northwest Power Act provides three tools that can be used in the effort to mitigate fish and wildlife losses resulting from the Columbia River hydroelectric dams. First, the Act assigns responsibility for developing a fish and wildlife program to the Northwest Power Planning Council, which is composed of representatives from the four States in the Columbia River Basin (Idaho, Montana, Oregon, and Washington). The Council gives the people of the Northwest a significant voice in decisions on what should be done to protect

their fish and wildlife resources and mitigate the adverse effects of decades of hydroelectric development. Second, the Act directs that the river and its tributaries be treated as a system to the greatest extent possible. This allows regional solutions that go beyond the problems related to each particular dam and address the cumulative impacts of the entire hydroelectric system. Third, the Act explicitly gives the Bonneville Power Administration (BPA) the authority and responsibility to use its legal and financial resources "to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with ... the program adopted by the Council ... and the purposes of this Act."

The Act limits this adopted program to the measures that protect, mitigate, and enhance fish and wildlife affected by the development, operation, and management of hydroelectric facilities on the Columbia River and its tributaries. The Council must develop this program "while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply." The clear, overriding principle of the Act is that fish and wildlife interests and power interests shall cooperate as partners in the development, operation, and management of the Columbia River hydroelectric system.

#### ROLE OF THE COUNCIL

Federal operating and regulating agencies emphasized their independent responsibilities for carrying out the adopted program and for fish and wildlife mitigation and enhancement in general throughout the development of this program. The Northwest Power Act is explicit on this subject. Under section 4(h)(10)(A), BPA is directed by Congress to use its revenues, financing authorities, and all of its legal authorities "to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with ... the program adopted by the Council under this subsection, and the purposes of this Act." Under section 4(h)(11)(A), Congress directed the BPA and the Federal operating and regulating agencies to exercise their responsibilities consistent with the purposes of the Act and other applicable laws, to provide equitable treatment for fish and wildlife, and to take this program "into account at each relevant stage of decisionmaking processes to the fullest extent practicable."

The Council is not a Federal implementing agency. Although Congress directed the Council to plan the fish and wildlife program, execution of the plan is the responsibility of several Federal agencies. The Northwest Power Act anticipates cooperation between the Council and the Federal implementing agencies to achieve the goals set by Congress.

The Northwest Power Planning Council program embodies a comprehensive, systemwide approach to the protection, mitigation, and enhancement of fish and wildlife in the Columbia River Basin. The Council has developed and maintained extensive methods to inform the people of the Northwest about the issues at stake and to seek the advice and consultation of the BPA, fish and wildlife agencies, tribes, Federal operating and regulating agencies, customers of the BPA, and electric utilities that own or operate hydroelectric dams on the

Columbia River or its tributaries. The amount of technical effort and public participation is a clear indication of the importance with which it is viewed by the region. The final measure of the success of this program will be the restoration of abundant fish and wildlife resources throughout the Columbia River Basin.

## WATER BUDGET

### OPPORTUNITY

The Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. 839 et seq. (also referred to as the "Northwest Power Act"), directed the Northwest Power Planning Council to "promptly develop and adopt ... a program to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries." The Act further directed that "the program, to the greatest extent possible, shall be designed to deal with that river and its tributaries as a system." The Northwest Power Planning Council was required to consult with a variety of groups in the Northwest during the development of the program, including the Indian tribes, and to maintain comprehensive systems for public participation.

### BACKGROUND

The Council considered the "sliding scale minimum flows" recommended by the fish and wildlife agencies, as well as "optimum flows" recommended by the tribes, and determined that increased spring flows were needed at Priest Rapids Dam and Lower Granite Dam to improve juvenile salmon migration in the Columbia and Snake rivers, respectively. Flows during the remainder of the year generally are sufficient for migration. The Council considered it most important to provide adequate flows during that portion of the spring when smolts migrate downstream and adopted a "Water Budget" approach to improving spring flows. With this approach, the fish and wildlife agencies and tribes have the ability to determine flows from April 15 through June 15 by using a volume of water (the "Water Budget") specified by the Council. Separate Water Budgets were established for the Priest Rapids and Lower Granite dams.

Fish and wildlife agencies and tribes are able to increase spring flows for the downstream migration of juvenile salmon through the use of the Water Budget. The Council established a schedule of firm power flows from April 15 through June 15 to provide a base from which to measure Water Budget usage. The Water Budget can be used by the fish and wildlife agencies and tribes to implement any flow schedule that would ensure juvenile salmon survival, provided the flows meet existing, firm nonpower commitments. The Water Budget is not to be used to achieve flows greater than the optimum flows (140 cfs for both Priest Rapids and Lower Granite dams) recommended by the tribes. Water used for the Water Budget creates a reduction in firm energy load carrying capability throughout the year, with the concomitant benefit of improving the survival of juvenile migrants.

The Council also requires a study of the effectiveness of the Water Budget in terms of improved salmon survival and travel time. The Council believes that a Water Budget approach at Priest Rapids and Lower Granite dams will markedly increase the number of Columbia Basin fish, without seriously affecting the provision of an adequate, efficient, economical, and reliable power supply. This is the first effort to establish a Water Budget for fisheries enhancement, and the Council anticipates that the currently-specified Water Budgets will be modified through a program amendment process, based on study results and whether or not increases in scheduled firm power flows occur in the spring. The Council will consider modifying the size of the Water Budget, based on the extent to which scheduled firm power flows are increased during the spring, as an incentive for Bonneville and the region's utilities to increase scheduled firm power flows during the April 15 through June 15 period.

The Council agreed that creating coordinating positions would allow personnel from fish and wildlife agencies and tribes to develop the needed skills to participate in power system decisionmaking that affects fish. The Council calls these coordinators "Water Budget managers" and has assigned one such position to coordinate the majority of the fish and wildlife agencies and one to coordinate the majority of the Columbia River Basin tribes. The Council also assigned an advisor to its staff to review the operation of the Water Budget, advise the Council on all matters related to the Water Budget, and assist the Council in resolving Water Budget disputes.

#### EXAMPLE

Federal project operators and regulators must provide the fish and wildlife agencies and tribes with a total Water Budget of 78 kcfs-months (4.64 Maf). This budget is to be divided into 58 kcfs-months (3.45 Maf) at Priest Rapids Dam on the Columbia River and 20 kcfs-months (1.19 Maf) at Lower Granite Dam on the Snake River.

The Council established the "firm power flows" listed in Table 5 to provide a base from which to measure Water Budget usage. Water Budget managers request flow quantities and dates for Priest Rapids and Lower Granite dams. The flows requested must be greater than the firm power flows and less than 140 cfs. Water Budget usage is measured as the difference between the actual average weekly flows, which result from the requests of the Water Budget managers, and the firm power flows.

Table 5. Firm power flows (average weekly K cfs).

	Priest Rapids Dam	Lower Granite Dam
April 15 through April 30	76	50
May 1 through May 31	76	65
June 1 through June 15	76	60

The Federal project operators and regulators are expected to incorporate the Water Budget requirements in all system planning and operations performed under the Columbia River Treaty, the Pacific Northwest Coordination Agreement, all related rule curves, and in other applicable procedures that affect river operations and planning. These parties are expected to act in good faith in implementing the Water Budget as a "firm" requirement. The Council expects that thermal plant maintenance will be moved into the April 15 to June 15 period. Fish and wildlife agencies, tribes, and Water Budget managers must give the U.S. Army Corps of Engineers 3 days written notice of changes in the planned flow schedule under the Water Budget.

## EVALUATION

The first full year of operation for the Water Budget was 1984. Water Budget flows in the mid-Columbia River were provided at Priest Rapids Dam from April 27 through June 5. Flow requests from the Water Budget Managers were met in all cases except over the Memorial Day weekend and during the first week in June (for flood control purposes). No Water Budget requests were submitted for the Snake River in 1984 because of extremely high runoff. There were several implementation problems during 1984. Resolution of these problems during the next several years will be dependent on any increased success of migration through the Columbia River System by juvenile salmon and steelhead resulting from the implementation of the Water Budget.

The Water Budget is the cornerstone of the Fish and Wildlife Program designed by the Northwest Power Planning Council. As such, it is fundamental to the success of the Council's charge to "protect, mitigate, and enhance" the fishery resource of the Columbia River System. Efforts and money spent to improve and protect habitat, manage harvests, and provide for increased artificial production will have limited success without improvement in the survival of downstream migrants. Flows needed by juvenile fish should be equal to other system needs, as intended in the original legislation forming the Council (Northwest Power Planning and Conservation Act of 1980). Meeting this goal requires a shift in the priorities and procedures used for planning and operating the Columbia Basin hydroelectric system. Experiences during 1984 demonstrated that the Water Budget can work, but that more work needs to be done to ensure its smooth operation.

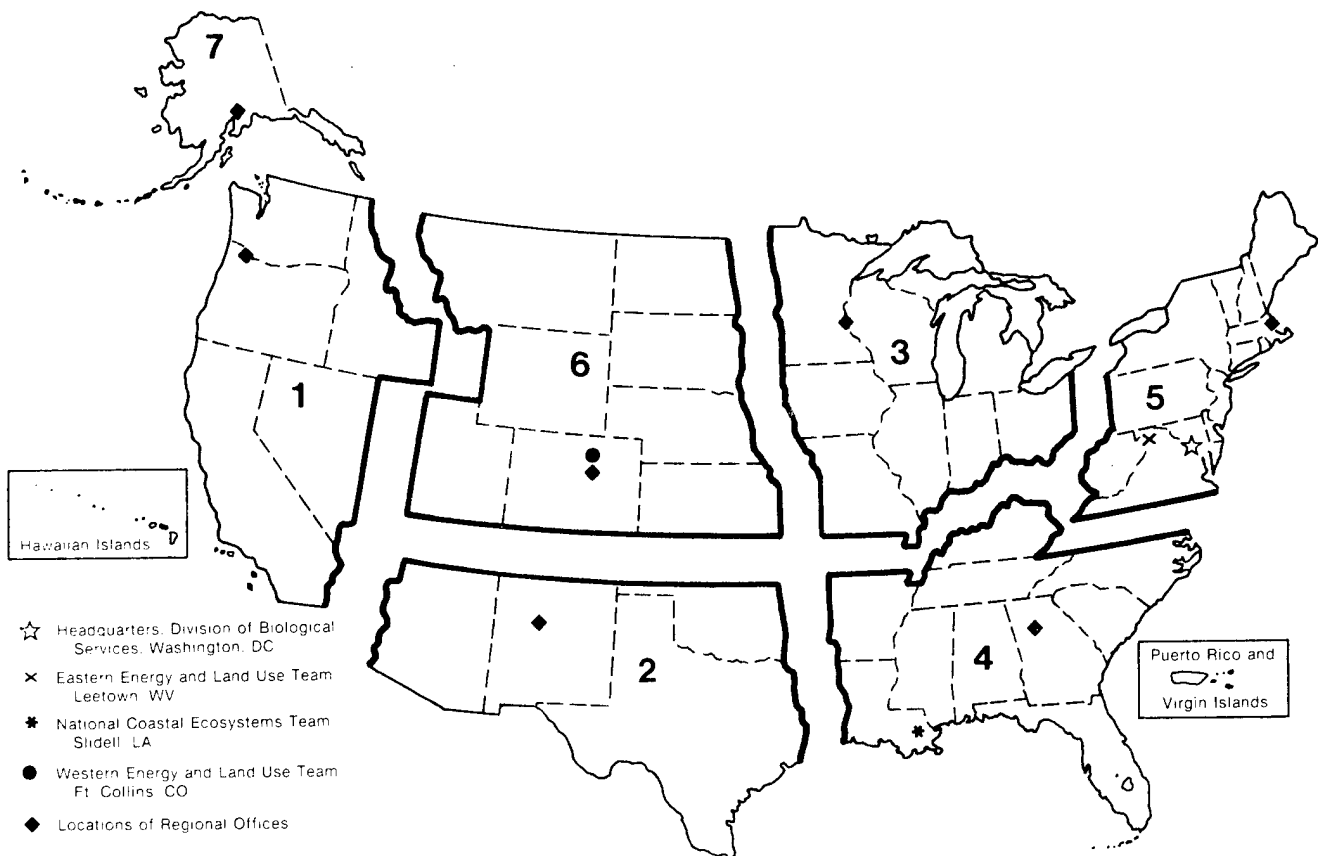
The Water Budget Managers from the fish and wildlife agencies and the tribes and the Water Budget Advisor from the Council will continue to work toward the goals described in the Act and the program. It is hoped that these efforts will be successful in accomplishing a new modus operandi for system operations that will provide equitable considerations of fishery needs.

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